NEXT ANNUAL MEETING WILL BE HELD AT BOSTON THE WEEK OF AUGUST 24

AMERICAN BAR ASSOCIATION

JOVRNAL

VOL. XXI DECEMBER, 1935 NO. 12

Plan for Bringing About Representative and Improved Organization of Legal Profession in the United States

The States and the Legal Profession
BY HON. WILLIAM L. RANSOM

The Federal Social Security Act
BY BARBARA NACHTRIEB ARMSTRONG

Review of Recent Supreme Court Decisions
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BY MILWARD W. MARTIN

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Published Monthly by American Bar Association at 1140 North Dearborn Street, Chicago, Illinois.
Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912.
Price: Per Copy, 25c; Per Year, $3; To Members, $1.50.

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AUTOMOBILE accident prevention can be the most productive during the period when automobile accidents are most serious. That period is the last half of the year, and especially the last four months.

Drivers and pedestrians will have to exercise extraordinary care to avoid death or injury in automobile accidents from now to the end of the year. Experience shows that the casualty record of the last four months is 40 per cent worse than the first four months, and 20 per cent worse than the second four months.

Unless conditions show a decided improvement, around 15,000 persons will be killed in automobile accidents from September to December inclusive.

Every person needs to remember to drive and walk carefully. That is the essential thing which every person can easily do to help reduce accidents.

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AMERICAN BAR ASSOCIATION
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Bar Association of St. Louis Receives Award for Distinguished Public Service—Citation Mentions Its Zeal in Efforts to Advance Ethical Standards—First Group to Be Thus Honored

"THE accomplishments of the Bar Association of St. Louis have been an example of public service and an inspiration for good citizenship in our local and national life."

Thus reads the last paragraph in the citation accompanying the St. Louis Award for Distinguished Public Service for the past year, which was conferred on the Bar Association of St. Louis on Nov. 2. The citation particularizes as follows: "This certificate is awarded to the Bar Association of St. Louis in recognition of the zeal and devotion shown by its officers, committees and members in their attempts to advance the ethical standards of the legal profession; in acknowledgment of those efforts which have contributed substantially to the establishment during the past year of the regulation whereby control of the bar is lodged in the Supreme Court of Missouri, and in recognition of the activities of the Grievance Committee of the association in its determination to maintain high professional practices."

The Award, in addition to the certificate of distinguished public service, carries a gift of $1,000. It was established by an unnamed donor for a period of ten years and has come to be a significant feature of the community life of the city. The previous recipients of this distinction have all been individuals, but this year the Committee of Award decided to employ it to give public recognition to a notable group achievement in the field of public service.

Presentation Ceremony

The ceremony took place in Mayor Dickmann's office in the City Hall. In presenting the certificate and check to Thomas F. McDonald, President of the St. Louis Bar Association, Mr. Frank C. Rand, a member of the Committee of Award, spoke as follows:

"In making the award this year the committee has seen fit to depart from its custom of presentation to an individual. With mature deliberation and having satisfied ourselves that the terms of the anonymous gift permitted it, we then had for consideration the wisdom of such a decision.

"To the committee it seemed that there were many reasons why, upon occasion, this award might be made to a group rather than an individual.

"In these days—when human problems and human relationships assume such perplexity—when the leading nations of the earth have lowered their moral standards by surrendering or deadening their keen sense of obligation—when our national problems become more and more involved with each new experiment or panacea offered for improvement of our national life, the determined and courageous action of the Bar Association of St. Louis has attracted the favorable attention and admiration of our city, state and nation.

"Associations or institutions do not grow of themselves—they grow in response to activities of individuals or groups. Our inquiries and investigations have led us to the conclusion that the splendid achievement of the Bar Association is the result of group activity performed with good will, generous zeal and loyalty.

"We recognize that major credit goes to certain officers and members of the association, to its Grievance Committee and to its Executive Committee. These individuals, by the example they have set and the courage with which they have undertaken their duties, deserve the highest commendation; yet the Award Committee feels the activities of the association constitute essentially a group movement—born out of a complexity of human desires, needs and aspirations of its members.

"For years the members of the bar had felt, with humiliation and some desert, that it was in bad repute. Unethical, dishonest, and fraudulent practices, if not encouraged, were overlooked or dealt with ineffectually; but of late there has been a new attitude toward these problems. The Bar Association has displayed a zeal and devotion to matters concerning the advancement of ethics, the raising of standards and the inculcation of high moral principles amongst lawyers. It was a splendid awakening—meeting with the hearty support of its members—and was truly praiseworthy.

"The opinion delivered by the Supreme Court of Missouri on October 16, 1933, marks a new epoch in bar control in this state. The court therein reasserted the doctrine, long lost sight of, that the judiciary has inherent power to

prescribe rules for the organization, discipline and supervision of the bar.

"The splendid work of the Bar Association of St. Louis and its Grievance Committee may be said to have initiated the movement which culminated in the adoption of these rules of control. After the court's decision the Missouri Bar Association, quick to see the potentialities of the situation, formulated a resolution requesting the Supreme Court to appoint a commission to investigate and report its recommendations with respect to regulating the practice of law in Missouri. The committee was appointed in November, 1933. After an exhaustive study covering a period of several months, the report was completed and submitted to the Supreme Court April 1, 1934. The report covered rules of administration of the bar, prescribed the canons of ethics as the standard of conduct, provided a system of proceedings with reference to discipline and also provided for a Judicial Council. On June 18, 1934, with only minor changes, the Supreme Court adopted the report in its entirety. Missouri today has an integrated bar and an effective statewide system for the discipline of lawyers.

"The history of this successful movement has engendered a new consciousness on the part of the bar concerning all matters of ethics and professional standards.

"'The profession of law means, or should mean, devotion to public interest.' This is the conception of your high calling as defined by a distinguished member of the St. Louis Bar and a former charter member of the St. Louis Award Committee—the Honorable Charles Nagel, whose wise counsel and unfailing interest have been invaluable to the Award Committee in its deliberations.

"The work that you have begun and have prosecuted so successfully thus far has been due to sincerity of purpose, backed by enthusiasm and persistency—which Emerson calls the 'chief characteristic of heroism.'

"The Bar Association of St. Louis has the grateful appreciation of St. Louis. As a reward for its splendid service during the past year; as an incentive to its members and to those of other civic organizations for continued and increased social responsibility, the committee has made this award. I consider it a distinct privilege to present, in behalf of the St. Louis Award Committee and the donor of the award, the Certificate of Civic Merit and the donor's gift to the Bar Association of St. Louis."

President McDonald's Reply

President McDonald replied:

"The Bar Association of St. Louis gratefully accepts this award and will value it highly. It is and shall be an incentive to the association to discharge its obligations with such fidelity to public interest as to warrant the approval of all thoughtful people."

The Award was presented to the membership of the St. Louis Bar Association at a special meeting held Nov. 4. Members of the Committee of Award are as follows: J. Lionberger Davis, Rev. Alphonse M. Schwitalla, S. J., Isidor Loeb, George T. Moore and Frank C. Rand. Mr. Gilbert Harris is the Committee's secretary.

President Ransom Congratulates Association

President Ransom has sent the following letter of congratulation to President McDonald:

Dear Mr. McDonald:

I am happy to read in the *Globe-Democrat* that the Bar Association of St. Louis has received the St. Louis award for distinguished public service during the past year; and I most heartily congratulate the Association, its leaders, and its members, upon this well-deserved recognition of efforts which have commanded the admiration and approval of lawyers and the public throughout the United States.

At a time when so much of criticism of members of the legal profession is heard in the land, it is encouraging news that an important local Bar Association, situated in one of our great cities, has been able to excel in rendering distinguished public service, through practical efforts to advance the ethical standards of the profession and provide the machinery for their better enforcement.

The lawyers and the public are greatly in your debt, but are gratified by the honor accorded to your Association by your community.

Very cordially yours,
WILLIAM L. RANSOM.

Nov. 4, 1935.

"A Merited Award"

Under the title of "A Merited Award," the St. Louis Post-Dispatch says this editorially in its issue of Sunday, Nov. 3:

"The selection of the St. Louis Bar Association as this year's recipient of the annual St. Louis award for distinguished public service is excellent. As the award committee of prominent citizens explains, the presentation of the $1,000 award to an organization marks a departure from the custom of conferring it on an individual. The community, in our opinion, will recogize this departure as entirely justified.

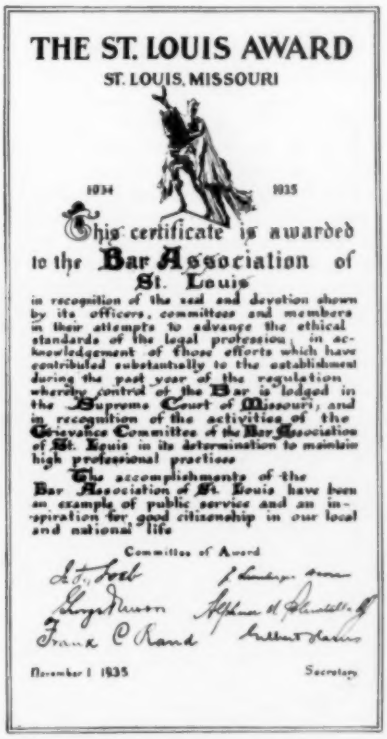
"The award takes notice of the good work of the St. Louis Bar Association not only in 1935, but during the last several years. This work has been on two main fronts. One campaign was the immediate one of cleaning up the practice of law locally by bringing disbarment suits against unethical lawyers. The second campaign had for its goal the establishment of disciplinary machinery throughout Missouri, through which the bar as a whole might rid its ranks of those who were dragging the profession into disrepute.

"Both campaigns brought results. In the 10 years prior to June, 1932, the local bar association filed only two disbarment petitions and but one of these resulted in a removal from the right to practice. In the three years after June, 1932, the Grievance Committee of the Bar Association instituted 22 disbarment suits, resulting in 14 disbarments and 5 suspensions. While three successive presidents of the Bar Association, William T. Jones, Walter R. Mayne and Kenneth Teasdale, supported and encouraged this clean-up movement, chief credit for the achievement must go to Thomas F. McDonald, chairman of the Grievance Committee from June, 1932, until his election as president of the association to succeed Mr. Teasdale. Mr. McDonald bore the brunt of a hard job; the inability of his committee to require persons to come before it was only one of the many difficulties confronting the Grievance Committee of the voluntary association. It was particularly fitting that it fell to him as the president of the association at this time to receive the award in the ceremony at the City Hall.

"While the Grievance Committee was waging war on unethical practice, the association proper was working with the Missouri Bar Association to bring about the integration of the bar on a self-disciplining basis. Defeated in the Legislature, these resourceful advocates of practice reform turned to the State Supreme Court, asking that tribunal to exert its authority to regulate the conduct of lawyers by drawing up rules for practice. The suggestion was accepted. A Judicial Commission was appointed by the court, a set of regulations was formulated and placed in effect. Today it is a responsibility of this integrated bar, under the rules of the court, to be on the lookout for unethical lawyers, and when they are found to prosecute them and punish them.

"If there have been workers in the St. Louis Bar Association who have felt that their organization was going into eclipse because of the new all-inclusive organization, the selection of the local bar association for the St. Louis award is enough to let them know that its fine work is very much in the public eye and greatly appreciated."

Presentation of St. Louis Award. Left to Right: Thomas F. McDonald, President St. Louis Bar Association; Mayor Bernard F. Dickmann, and Frank C. Rand, Member of Award Committee.



THE ST. LOUIS AWARD

ST. LOUIS, MISSOURI

1934 1935

This certificate is awarded to the Bar Association of St. Louis in recognition of the zeal and devotion shown by its officers, committees and members in their attempts to advance the ethical standards of the legal profession; in acknowledgement of those efforts which have contributed substantially to the establishment during the past year of the regulation whereby control of the Bar is lodged in the Supreme Court of Missouri; and in recognition of the activities of the Grievance Committee of the Bar Association of St. Louis in its determination to maintain high professional practices

The accomplishments of the Bar Association of St. Louis have been an example of public service and an inspiration for good citizenship in our local and national life

Committee of Award

Frank C Rand

November 1 1935 Secretary

Law List Committee to Make Survey

THE Special Committee of the American Bar Association on Law Lists held a meeting in Chicago November first and second and decided, in view of the widespread interest being shown in the subject in various states, to first institute a thorough investigation. The purpose of the contemplated survey is to endeavor to ascertain whether or not there is a demand on the part of the business and professional interests of the country for a list or lists of attorneys, and then if there is, to try to find out the type or types of list or directory that will best meet that demand and at the same time be sound from a professional viewpoint and otherwise feasible.

It is proposed to procure facts and expressions of views from a large number of those interested and thereafter to formulate a report and make appropriate recommendations. The inquiry is to proceed in the first instance upon a more or less abstract basis, and if the Committee should reach the conclusion that a proper solution of the vexing problem can be had better by procuring amendments to the Canons of Ethics, it will endeavor to bring about such amendments in an orderly way.

A committee of the Commercial Law League of America, including its President and Executive Secretary, met and conferred with the American Bar Association's Committee for a half-day session and offered numerous helpful suggestions and future cooperation. Bar associations of several states have become interested in the Law List question and it is hoped that some satisfactory solution may be forthcoming and made of general application throughout the States.

Philadelphia Bar Favors Limit on Admissions

LIMITATION of the number of applicants who may be admitted to the Philadelphia Bar each year was approved by Philadelphia lawyers on a referendum submitted by the Philadelphia Bar Association. The question was submitted to some eighteen hundred attorneys, both members and non-members of the Association, and read as follows:

"Do you approve the principle of a limit of the number of applicants who may be admitted to the Philadelphia Bar each year, such limitation to be prescribed by the Common Pleas Court, the Orphans' Court and the Municipal Court of Philadelphia County." A total of 1031 votes was cast in favor of the principle as compared with 729 votes against it.

There was, however, a lively debate at the meeting at which the results of the poll were presented, which indicates that there is still strong opposition to the idea. Speakers attacked it on the ground that such a limitation would be un-American and undemocratic.

Plan for Improved Organization Presented to Regional Meeting

THE plan drafted by the Committees for an improved organization of the American Bar Association, published in this issue of the JOURNAL, was presented for the first time for the consideration of lawyers, at the large Regional Meeting of the States of Georgia, Alabama, Florida, South Carolina, North Carolina, Kentucky and Mississippi, held under the auspices of the Association in Atlanta, Georgia, on November 23rd.

The plan was outlined and discussed by Former President Scott M. Loftin of Florida, President William L. Ransom of the American Bar Association, President A. B. Lovett of the Georgia Bar Association, B. Allston Moore of the Junior Bar Conference in South Carolina, and Vice-President George B. Rose of Arkansas. E. Smythe Gambrell of Atlanta presided. A full account of this regional meeting will appear in the January issue of the JOURNAL.

Printed copies of the plan were distributed to the lawyers present. The sentiment of those present appeared to be strongly in favor of the principal features of the plan as drafted.

Pamphlet copies of the plan may now be obtained by any lawyer, on written request to the American Bar Association.

Advisory Committee on Federal Procedure Meets in Washington

THE Advisory Committee, appointed by the Supreme Court of the United States to prepare and submit to the Court for its consideration a draft of a unified system of rules of practice and procedure in civil actions in the Federal district courts and in the Supreme Court of the District of Columbia, met in the conference room assigned to it in the new Supreme Court Building November 14th and continued its sessions through Wednesday, November 20th.

The Chairman, former Attorney General William D. Mitchell, called the meeting to order. There were present Scott M. Loftin of Jacksonville, Florida; George W. Wickersham of New York City; Wilbur H. Cherry of Minneapolis, Minnesota; Charles E. Clark of New Haven, Conn.; Armistead M. Dobie of Charlottesville, Virginia; Robert G. Dodge of Boston, Massachusetts; George Donworth of Seattle, Washington; Monte M. Lemann of New Orleans, Louisiana; Edmund M. Morgan of Cambridge, Massachusetts; Warren Olney, Jr., of San Francisco, California; Edson R. Sunderland of Ann Arbor, Michigan, and Edgar B. Tolman of Chicago, Illinois. Mr. Gamble of Iowa was unfortunately absent on account of illness.

At the previous meeting in Chicago on June 20, 1935, Dean Charles E. Clark of Yale, who had been designated as Reporter to the Committee, had been instructed to prepare and submit a tentative draft of rules, and with the aid of a research staff of ten men, teachers and practitioners, he had prepared such a draft. The men who participated in the preparation of that work were Professors Harry Shulman and Fleming James, Jr., of Yale; James William Moore, Edward C. Jaegerman, Ferdinand F. Stone, Nathan Ostroff, George C. Bott, Frederick H. Cogswell, Frank H. Whittemore, and Walter V. Schaefer.

Professor Edson R. Sunderland of the University of Michigan, at the request of Dean Clark, prepared and submitted rules on pre-trial procedure, including depositions, discovery, and summary judgments.

Suggestions were also submitted from Professor Charles O. Gregory of the University of Chicago as to rules in third party practice; from Professor Borchard of Yale on declaratory judgment procedure; and from Professor Chafee of Harvard on Interpleader.

All of the recommendations submitted by the various committees in each Federal circuit and district, in reply to a letter from the Attorney General written in January, 1935, and by judges and members of the bar were analyzed, classified, and transmitted to Dean Clark by Edgar B. Tolman, acting as Secretary to the Advisory Committee, with preliminary suggestions derived from their study.

A tentative draft of a complete set of rules was thus prepared. Copies of the draft were made by the secretarial staff as well as copies of the Federal Equity Rules and Statutes dealt with in the rules. Mr. Tolman and his assistants, Edward H. Hammond and Leland L. Tolman, also compiled the suggestions of the local committees and furnished each of the above to each member of the committee numbered to correspond with the proposed rule to which they pertained. These suggestions were carefully considered by the Advisory Committee and, although many of the suggestions were prepared for law rules, they were found very useful when the project was enlarged by the decision of the Court to proceed at once with the formulation of a single set of rules for all civil actions.

Each of the rules was fully discussed by the committee and either approved in principle or ordered redrafted with specified alterations. It is expected that the revised rules will be submitted to the members of the Advisory Committee about the middle of December and considered again in sessions to be held as soon as possible thereafter.

Before the Committee makes its report or recommendations to the Court, the proposed rules will be submitted for criticism to the local committees of the bar, appointed in each district by the Federal district judges, and ample time given to the bench and bar generally to consider the rules and make suggestions to the Advisory Committee.

The Committee is acting only in an advisory capacity, and the Supreme Court of the United States will merely use the committee's draft to assist it in framing the rules.

Missouri Court's Rule Relating to Law Lists

THE Supreme Court of Missouri, on October 18, entered an order defining reputable law directories and law lists, and granting to the Advisory Committee to the General Chairman of Bar Committees of Missouri power to pass upon what are reputable law lists and law directories within the meaning of the Rule.

The definition is contained in an amendment to Section 43 of Rule 35. The Section, as amended, after stating what may be contained on a professional card inserted in a reputable law directory or reputable law list, continues as follows:

"A 'law directory' as used herein is a publication containing a roll of all lawyers engaged in the practice which the directory purports to cover.

"A 'law list' as used herein is a publication containing a selected list of lawyers engaged in a particular line of practice or in the general practice.

"A publication, the prime purpose of which is not the listing of lawyers, or which contains a roll of lawyers as an adjunct to other matter not addressed to the profession, is not within the term 'law directory' or the term 'law list.'

"Law lists and law directories may be maintained as instrumentalities of the subscriber lawyers for the purpose of affording media of contact between lawyers. A reputable law directory or reputable law list is a publication which, as the instrumentality of its subscribers, serves the profession with fidelity and does nothing to cause its subscribers to be guilty directly or indirectly of any professional misconduct.

"A publication the circulation of which is not confined to members of the profession is not within the term 'reputable law directory' or the term 'reputable law list.'

"A publication which guarantees to its users the fidelity of its listees through bond, guaranty, or any other similar means is not a reputable law directory or reputable law list.

"A lawyer who places his name or card in a publication which he knows is not a reputable law directory or reputable law list is guilty of unprofessional conduct."

This portion of the Section becomes effective July 1, 1936.

Rule 36 is also amended by adding a new section which gives the Advisory Committee to the General Chairman of the Bar Committees the power to determine what publications come within the terms, "reputable law list" and "reputable law directory," as above defined. It also gives the Advisory Committee the further power to "investigate and determine whether the service rendered by any particular law directory or law list in affording a medium of contact between lawyers, justifies its patronage by the bar." A third provision is that the findings of the Advisory Committee with reference to compliance by law directories and law lists with Section 43 of Rule 35 of the Court, and with reference to the service rendered by them, shall be announced to the Bar of the State.

The Committee has begun procedure under the authority above granted.

Washington Letter

Securities Act Held Constitutional by Circuit Court of Appeals

THE Securities Act of 1933 has withstood the test of its constitutionality in three respects in the Circuit Court of Appeals of the Second Circuit. The decision was rendered November 5, 1935, in the case of Jones v. Securities and Exchange Commission and the opinion was written by Circuit Judge Martin T. Manton.

In upholding the exclusion from the mails of unregistered securities, it was noted that the power of Congress to control the mails through statutes prohibiting their use to defraud is fully sustained by decisions of the Supreme Court. The opinion continued:

"It is not an unreasonable method of preventing the use of the mails to promote and consummate the sales of misrepresented securities, to require that all securities before mails are used, must be registered. Congress clearly had the power to enact the provision excluding securities from the use of the mails unless a true statement describing them was filed in a public office in Washington."

The act, as the court ruled, is not violative of the due process of law clause of the Fifth Amendment to the Constitution by reason of its requirement for registration of corporations as a condition precedent to their issuance and sale of stocks. It was determined also that, although, like all other powers of Congress, the postal power is subject to the limitations imposed by the Bill of Rights, nevertheless, as the Supreme Court has held, the State blue sky laws requiring registration of all securities, whether good or bad, do not violate the due process clause of the Fourteenth Amendment. "Similar registration required within its jurisdiction by the Federal Government would likewise be clear of the inhibitions of due process in the Fifth Amendment."

The Circuit Court further held that there was not an unconstitutional delegation of legislative powers in Section 19 (a) of the act empowering the Securities and Exchange Commission to make rules. It was observed that the Supreme Court in the Schechter case, 295 U. S. 495, and in Panama Refining Co. v. Ryan, 293 U. S. 388, expressly recognized that details of a subordinate nature may be supplied by administrative regulations. The authority delegated to the Commission by the Securities Act was held to be merely a power to supply the necessary flexible details.

Public Utility Act Held Unconstitutional in District Court

A determination of the constitutionality of an act before it becomes effective has often been alleged to have advantages. This, in a measure, has occurred through Federal District Judge Coleman's recent decision, in Baltimore, holding unconstitutional the Public Utility Act of 1935 which provides for registration of such holding companies by December 1, 1935. Judge Coleman's 96-page opinion covered exhaustively the points on which it was based. The decision was rendered Nov. 7.

The Securities and Exchange Commission does not consider itself bound by the decision. Chairman James M. Landis is quoted as saying that this law "is valid until the Supreme Court declares otherwise." He said also that, if the utility companies decline to register, there would be a doubt as to the legality of their subsequent actions such as issuing securities, negotiating contracts, acquiring other companies, and even performing sales and service contracts.

The Chairman of the Commission further observed that the registration forms call for only a small amount of information about finances and operating structure and explained that "we have purposely made this as simple as possible. It calls for no unusual disclosures and places no heavy burdens. They can take this way or they can refuse to register—then they won't know where they are; neither will the public nor the stockholders."

Chairman Frank R. McNinch of the Federal Power Commission called attention to the fact that Title I of the act deals with holding company systems whereas Title II deals with interstate operating companies and licensee companies both within and without the holding company systems. He explained that Title II, which his agency administers, was left untouched by the Baltimore ruling. He said further:

"Judge Coleman's summary may lead to widespread misunderstanding as to the scope and effect of his decision. The court specifically says that Title II is not involved in the case. Yet in his summary and in the concluding part of his opinion he declares the Public Utility Act 'to be void' in its entirety.

"Manifestly, after having specifically exempted Title II from the opinion, the general statement that the entire Public Utility Act is unconstitutional can only have reference to Title I, which alone was the issue in the case."

This case is entitled: In the Matter of American States Public Service Company, Debtor. It grew out of a proceeding under Sec. 77B of the Bankruptcy Act (11 U. S. Code, Sec. 207). The trustees petitioned the court for instructions as to whether the Public Utility Act of 1935 (Public No. 333 of 74th Congress) is valid, and if so, whether they are subject to its provisions. There were numerous appearances in the case, including John W. Davis, Esq., in behalf of a creditor; five different officers and agencies of the Government; and Ralph P. Buell, Esq., for Burco, Inc., a company formed to protect the rights of bondholders and which plans to take an appeal. The Government was not a party to the case, its attorneys appearing as amici curiae.

After mentioning the type of companies to which Title II of the act applies, the court's opinion continues: "Administration of Title II is vested in the Federal Power Commission. By express provision in Title II (Section 318), if any individual or company is subject to any requirements of Title I, as well as to any requirements under Title II, the requirements of Title I shall alone prevail, unless the Securities and Exchange Commission has granted an exemption from such requirements, in which event, the requirements of Title II only shall apply. By virtue of this provision and the particular facts, we are not concerned in this proceeding with Title II."

The syllabus of the case states, in part, that:

"1. The question as to the validity of the public utility act has been directly and properly raised. There has been no collusion between the parties. There is a real and not fabricated conflict of parties and interests. There is nothing premature about the proceedings. On the contrary, there is an actual, pressing need for a prompt ruling upon the act's validity, because of the fast-approaching date when the act, with its multifarious, drastic requirements, becomes effective, and because until such ruling is had it cannot be determined whether the pending reorganization proceedings are a futility, or should be progressed to a conclusion, as this court has directed.

"2. The public utility act is invalid in its entirety for the following reasons:

"A. Congress by its enactment has flagrantly exceeded its lawful power under the commerce clause of the Constitution in that the provisions of the act are, neither by their express language nor by any reasonable implication, capable of being restricted to the regula-

(*Continued on page* 823)

PLAN FOR BRINGING ABOUT A REPRESENTATIVE AND IMPROVED ORGANIZATION OF THE LEGAL PROFESSION IN THE UNITED STATES

As Prepared by the Coordination Committees of the American Bar Association*

Foreword

THE Co-ordination Committees created by the American Bar Association have drafted a plan for bringing about a representative and improved organization of the legal profession in the National sphere. Their recommendations have been outlined in the form of suggested provisions for the Constitution of the American Bar Association.

Their proposals are set forth in the following pages, together with an outline of Association By-Laws for consideration if the changes in the organic law of the Association are adopted.

The present draft of plan is outlined for the consideration of American lawyers. It is submitted as the present judgment and recommendations of the Committees, and reflects a consensus of the well-considered opinion of the members of the Committees and the suggestions received from Bar Associations and lawyers generally, rather than the views or draftsmanship of any individual or group. The draft is not regarded by the Committees as perfected for final action. It will be for the members of the Association to say whether or not such a plan shall be adopted and put in force. The Los Angeles convention directed the preparation and submission of a definitive plan.

The purpose in submitting and circulating at this time the draft of plan is to elicit further the comments and specific suggestions of State and local Bar Association Committees, and the lawyers, who have been studying the subject, in all parts of the United States. In the light of such comments and suggestions as are received, the further revision will be made, in order to put the proposals in form for action. The advice and suggestions of the Bar are sincerely invited.

The plan speaks for itself, and need not be reviewed in detail here. It starts with the present Constitution of the Association and proposes amendments and additions; it does not undertake to rewrite the present organic law from the beginning.

If approved and adopted, the plan will vest the control and administration of the American Bar Association completely in a House of Delegates genuinely representative of a substantial majority of the lawyers of the whole country, with provisions for a referendum vote on questions of major policy. For each State, the members of the American Bar Association therein will elect a State Delegate by mail ballot. Each State Bar Association will be entitled to one or more Delegates of its own choosing (no State more than four). Under indicated circumstances, a local Bar Association may qualify and elect a Delegate.

The parity of the States, in the process of nominations, is preserved; but the nominations of officers and of State Delegates are required to be made and published well in advance of the annual meeting, with opportunity for independent nominations.

The House of Delegates is made a truly representative body, not too large to function effectively, but with all phases of the Association work and membership brought together therein, along with Delegates of State and local Bar Associations whose members embrace more than half of the lawyers of the United States. The participation of the State and local Bar Associations will be voluntary and without commitment or sacrifice of autonomy. Administrative work of the Association between meetings will be conducted by a Board of Governors, elected by and from the members of the House of Delegates, with one elective member of the Board of Governors from each federal judicial circuit, together with certain *ex officio* members. The machinery is provided for practicable referenda to the whole Association membership, or to the membership of the State and participating local Bar Associations as well, to ascertain their views and wishes upon important questions of Association policy.

The members of the Association attending an annual meeting will constitute the Assembly, whose sessions will be cleared of routine and reports and made attractive as well as useful in the ascertainment of the views of the members present, after discussion. The Assembly will also elect five members to represent it in the House of Delegates.

An integral part of the sessions of the Assembly will be the open forum, already created for the New England meeting of the Association to be held in Boston during the week of August 24, 1936.

*SPECIAL COMMITTEE ON COORDINATION OF THE BAR: Jefferson P. Chandler, Chairman, Los Angeles, Cal.; Newton D. Baker, Cleveland, O.; Owen Cunningham, Des Moines, Iowa; John W. Davis, New York, N. Y.; Harry S. Knight, Sunbury, Penn.; A. B. Lovett, Savannah, Ga.; Philip J. Wickser, Buffalo, N. Y.

CO-ORDINATION COMMITTEE OF THE GENERAL COUNCIL: Sylvester C. Smith, Jr., Chairman, Phillipsburg, N. J.; Guy Richards Crump, Los Angeles, Cal.; George M. Morris, Washington, D. C.; D. A. Simmons, Houston, Tex.; Robert Stone, Topeka, Kan.

COORDINATION SUB-COMMITTEE OF THE EXECUTIVE COMMITTEE: Frederick H. Stinchfield, Chairman, Minneapolis, Minn.; Harry P. Lawther, Dallas, Tex.; Scott M. Loftin, Jacksonville, Fla.

CHAIRMAN OF THE CONFERENCE OF BAR ASSOCIATION DELEGATES: E. Smythe Gambrell, Atlanta, Ga.

Any member may offer a resolution upon a pertinent subject, and such resolution will be considered and reported on by a representative Resolutions Committee, after hearing proponents and opponents. The Resolutions and the reports thereon will be discussed and voted on in the open forum session of the Assembly, which will constitute a most interesting feature of the annual meeting. The experience of several large State Bar Associations leads to the belief that the plan will help bring about a greatly increased interest and attendance at the annual meeting.

The draft makes definite provision for bringing into being practicable plans by which the Association will be of greater usefulness to its members in their profession. The details of such practical service to the lawyers in their professional work cannot be embodied in a Constitution, but the development of plans for such informative services is made a duty of the Board of Governors and the House of Delegates. The whole text of the draft recognizes the essential unity of the science of law as a profession and the indispensable usefulness of the lawyer in general practice, and correlates the whole organization and work of the Association to that end.

The opinion and specific suggestions of the Bar as to the outlined proposals will be most helpful in completing and perfecting the draft, so that the same can be submitted for definite approval. It is believed by the Committees to offer a practicable plan, that will accomplish a most desirable step forward, as compared with the existing structure of organization. When the revised draft is completed in January, it is earnestly hoped that the resultant plan will deserve and receive general approval and support among members of the profession, leading to its final adoption in Boston next August. It seems clear to me that the members of the Committees have rendered a great service to American lawyers in advancing the matter to the present stage, where a definite plan is brought forward for action. It will be for the lawyers to decide whether or not it shall be adopted.

As a matter of time schedule and to avoid a year's delay in putting the new structure of organization into effect if it is approved, it will be noted that the plan contemplates that it will be considered and acted upon by the next annual meeting of the Association to be held in Boston, on the afternoon of its opening day (August 24, 1936). If the plan as finally determined upon and recommended by the Committees is adopted, the nominations of the Association's officers thereunder will be made, at the convention, by the State Delegates; and the election will take place in the Assembly. The House of Delegates will hold a meeting, during convention week, to organize preliminarily for its first year.

I shall be glad to give careful consideration to all comments and suggestions which are sent to me. Such comments and suggestions will also be brought promptly to the attention of the members of the several Committees on Co-ordination of the Bar.

WILLIAM L. RANSOM,
President of the American Bar Association,
1140 North Dearborn Street,
Chicago, Illinois.

CONSTITUTION

ARTICLE I

Name and Object

This Association shall be known as the AMERICAN BAR ASSOCIATION. Its objects shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and of judicial decision throughout the Nation, uphold the honor of the profession of the law, encourage cordial intercourse among the members of the American Bar, **and to correlate the activities of the Bar organizations of the respective States on a representative basis in the interest of the legal profession and of the public throughout the United States.***

ARTICLE II

Qualifications for Membership

Any person who is a member in good standing of the Bar of any State **or Territory of the United States** shall be eligible to membership in this Association, on **endorsement, nomination and election as provided in the By-Laws of the Association. The term "State" wherever used in this Constitution and By-Laws shall include the District of Columbia.**

ARTICLE III

The House of Delegates

SECTION 1. *Control and Administration of Association.* **The control and administration of the Association shall be vested in a House of Delegates representative of the profession of the law in the United States, subject to referendum pursuant to the provisions of Section 12 of this Article.**

SECTION 2. *Annual Meeting.* **There shall be an annual meeting of the Association, which shall include meetings of the House of Delegates and of the Assembly, together with such meetings of the Board of Governors, Sections, Councils and Committees as may be fixed by the Board of Governors. The time and place of the annual meeting shall be designated by the Board of Governors and announced at least six months before the date so fixed.**

SECTION 3. *Autonomy of State and Local Bar Associations.* **The membership and participation of any State or local Bar Association in the House of Delegates shall be at all times voluntary and shall not subject such State or local Bar Association to any financial or other obligation or liability except such as it may voluntarily assume.**

SECTION 4. *Membership of House of Delegates.* **The House of Delegates shall be composed of the following:**

The State Delegates, one from each State, chosen as hereinafter provided;
The State Bar Association Delegates, chosen as hereinafter provided;

*NOTE: New matter to be inserted or substituted is shown herein in bold-faced type. Except where essential to the continuity of the text, existing matter that is omitted is not shown in the present draft. Various provisions in the present Constitution have been transferred to the By-laws.

Five Delegates, chosen by the Assembly at the annual meeting;
Such Local Bar Association Delegates as may be chosen by and from Local Bar Associations as hereinafter provided;
The Delegates of such membership organizations of the legal profession as may be admitted to affiliation pursuant to Section 9 of this Article;
The President of the National Conference of Commissioners on Uniform State Laws;
The Chairman of the National Conference of Bar Examiners;
The Chairman of the National Conference of Judicial Councils;
The President of the Association of American Law Schools;
The Attorney-General of the United States;
The Solicitor-General of the United States;
The President of the National Association of Attorneys-General;
The Chairman of the Section of Bar Organization;
The Chairman of the Section of the Junior Bar;
The Chairman of each other Section of the Association;
The President, Secretary and the Treasurer of the Association;
The members of the Board of Governors.

No person shall be eligible to be a member of the House of Delegates in any capacity, who is not a member of the American Bar Association in good standing.

SECTION 5. *State Delegates.* There shall be one State Delegate from each State, and one State Delegate chosen collectively from the Territory of Hawaii, the Territory of Alaska, the Territory of Porto Rico, and the Canal Zone. The State Delegate from a State (or from the territorial group) shall be the Chairman of the delegate group from his State in the House of Delegates.

SECTION 6. *Nomination and Election of State Delegates.* Not less than one hundred and fifty days before the opening of the annual meeting in each year, not less than twenty-five members of the Association in good standing and accredited to a state (or territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections of the Association, constituted as hereinafter provided, a petition, duly signed, nominating a candidate for the office of State Delegate for and from such State (or territorial group). The Board of Elections shall thereupon cause each nomination, and the names of the signers of such petition, to be published in the next issue of the American Bar Association Journal. Not less than one hundred and twenty days before the opening of the annual meeting in such year, the Board of Elections shall cause to be prepared printed ballots for the election of such State Delegate, bearing the names of the nominees, if any, for the office of State Delegate from a State, and a space for personal choice; and shall cause an appropriate ballot to be mailed to each member of the Association in good standing in such State, with a request that such ballot, duly marked, be mailed to the Board of Elections not later than a date to be fixed by the Board of Elections. Said date shall be not later than sixty days before the opening of the annual meeting in such year, on which date the Board of Elections shall declare the polls for the election of such State Delegate duly closed, and shall proceed forthwith to count the ballots and to determine, announce, and publish the results of such election, and shall certify the same to the Board of Governors and the House of Delegates. Each State Delegate shall be nominated and elected for a term of three years to end with the close of the third annual meeting of the House of Delegates next following his election. If, during his term of office, any State Delegate shall resign or die or become disqualified after February 15th in any year, or if he shall fail to register in attendance at any annual meeting of the Association by twelve o'clock noon on the opening day therof, the office of such State Delegate shall be deemed to be vacant or forfeited by him for the remainder of his term; and thereupon members of the Association present at the meeting from his State shall convene and elect a successor to act until a nomination and election has taken place as hereinabove provided, and such successor shall take office immediately. In all elections a plurality of the votes cast shall elect. In case of a tie vote, the Board of Elections shall prescribe a method of determining the choice.

SECTION 7. *Selection of State and Local Bar Association Delegates.* Each State Bar Association shall be entitled to at least one delegate in the House of Delegates. State Bar Associations in states which have in excess of two thousand lawyers according to last preceding federal census shall be entitled to one additional delegate for each additional one thousand lawyers above such two thousand; provided, however, that no State Bar Association shall have more than four delegates. Any local Association having eight hundred or more members in good standing, twenty-five per cent of whom are members of the American Bar Association shall be entitled to one delegate. When a State Bar Association is entitled to additional delegates, the number of such additional State Bar Association delegates shall be reduced by the number of delegates elected by local Bar Associations within such state. Each State and local Bar Association Delegate shall be officially chosen in such manner as such Association shall determine. He shall serve for the term of two years and until his successor shall have been certified. Each State and local Bar Association shall certify to the House of Delegates, the names and addresses of the delegate or delegates elected for that Association. For all purposes under this Constitution, the number of members in good standing of the local Bar Association and of the American Bar Association shall be taken as of the thirty-first day of December next preceding. For the purposes of this Constitution the term "State Bar Association" shall be deemed to include the Bar organization of a State or Territory, if its Bar be incorporated or integrated: provided, however, that if, as to any State or Territory, the question shall arise as to which State Bar Association is entitled to select State Bar Association Delegates, the question shall be determined by the House of Delegates.

SECTION 8. *Assembly Delegates.* The five members of the House of Delegates chosen to represent

the Assembly of the Association shall be nominated in the same manner as officers of the Association. Such nominations shall be reported to the Assembly. Opportunity shall be given for the making of other nominations from the floor. Election shall be by a plurality vote of the Assembly for a term which shall commence at the adjournment of the meeting at which such delegates are elected and shall expire at the adjournment of the next annual meeting of the Assembly.

SECTION 9. *Delegates from Affiliated Organizations of the Legal Profession.* The American Law Institute, the American Judicature Society and any other national organization in the legal profession having individual membership and having twenty-five per cent of its members as members of the American Bar Association, and which shall be approved by the House of Delegates as an organization to be represented in the House of Delegates through affiliation with the American Bar Association, may, upon such approval, select, in such manner as such organization shall determine, one delegate, who shall thereupon become a member of the House of Delegates for a term of one year and until his successor shall have been certified.

SECTION 10. *Meetings.* The House of Delegates shall meet during the annual meeting of the Association, and at such other times and places as it may determine. Meetings of the House of Delegates may be called at any time by the Board of Governors, and shall be called by the President of the Association upon the written request of a majority of the members of the House of Delegates. Fifty members of the House of Delegates present at any meeting duly convened, shall constitute a quorum. The President of the Association or, in his absence, the Chairman of the House of Delegates, shall preside at the meetings of the House of Delegates. The House of Delegates may adopt such rules and procedure for the transaction of its business as it deems suitable, and shall be the judge of the election and qualifications of its members. Voting by proxy shall not be permitted.

SECTION 11. *Powers and Duties.* The House of Delegates shall have all the powers and duties necessary or incidental to the control and administration of the business and affairs of the Association and to the determination of its policies and recommendations, subject to referendum pursuant to Section 12 hereof. The officers, Board of Governors, Sections, Committees, agents and employees of the Association, shall be subject to the supervision and direction of the House of Delegates.

SECTION 12. *Referenda.* The House of Delegates may, at any time, by a majority vote of its membership, refer and submit to the members of the Association or to the membership of the State and participating local Bar Associations, defined questions affecting the substance or the administration of the law or affecting the policy or recommendations of this Association, which in the opinion of the House of Delegates are of immediate, practical consequence to the legal profession and the public throughout the United States. The House of Delegates may by resolution make rules and regulations, and establish suitable supervision for the polling of members of the legal profession upon the question so submitted. The result of such a referendum to members of the legal profession, when duly ascertained by such a vote, shall be binding upon the Association and upon all officers, sections, committees, agents and employees thereof.

SECTION 13. *Voting in the House of Delegates.* Each member of the House of Delegates, in whatever capacity, shall have one vote; no member shall have more than one vote by virtue of any dual capacity. The Secretary of the Association shall act as Secretary of the House of Delegates, shall keep a roster of its members entitled to vote, and shall keep and be the custodian of its minutes and records. The Chairmen of the Standing and Special Committees of the Association shall have the privilege of the floor in the House of Delegates, but shall have no right to vote as such Chairmen.

SECTION 14. *Members of the Present General Council.* Members in office at the time of the adoption of this Constitution as members of the General Council of the Association shall continue in office as State Delegates until the expiration or termination of their respective terms. Their successors shall be elected as State Delegates.

ARTICLE IV

The Assembly

SECTION 1. *Membership and Meetings of Assembly.* The Assembly of the annual meeting shall consist of such members of the Association in good standing as shall register at such annual meeting. Sessions of the Assembly shall be held at such times during the week of the annual meeting as the Board of Governors shall determine and announce, on at least thirty days' notice through publication in the American Bar Association Journal. The President shall act as the presiding officer of the Assembly, and the Secretary of the Association shall be the Secretary of the Assembly.

SECTION 2. *Resolutions and Open Forum Session.* At the opening session of the Assembly at each annual meeting, any member of the Association may present any resolution pertinent to the legal profession or to the objects of the Association. Resolutions so offered shall be referred to the Resolutions Committee, without debate at that time. Thereafter, during that annual meeting, the Resolutions Committee shall hold a public hearing upon the resolutions so offered and referred, together with such other resolutions as, prior to such hearing have been received by the Resolutions Committee. At such hearing the proponents and opponents shall be given a reasonable opportunity to be heard. The Resolutions Committee shall thereafter make its report upon each such resolution, for or against the same and with or without amendments or comments, to an open forum session of the Assembly during such week, at which time such resolution and report shall be open to reasonable debate; and a vote shall be taken thereon, as an expression of the views of the members present. The President shall promptly report to the House of Delegates all such resolutions, and reports and the results of the votes taken thereon, for the information and guidance of the House of Delegates.

SECTION 3. *Election of Assembly Delegates.* Upon nominations made as provided in Sections 1 and 2

of Article VII and Section 8 of Article III hereof, the Assembly shall elect five members of the House of Delegates.

ARTICLE V

Board of Governors

SECTION 1. *How Constituted.* There shall be a Board of Governors of the Association. The Board shall consist of the President, the Chairman of the House of Delegates, the last retiring President, the Secretary, the Treasurer, and the Editor-in-Chief of the AMERICAN BAR ASSOCIATION JOURNAL, all of whom shall be members ex-officio, together with ten other members to be elected as hereinafter provided, to serve for terms of three years. Any vacancy occurring in any elective membership of the Board of Governors shall be filled for the unexpired term, by election as herein provided. In the absence of the President, the Chairman of the House of Delegates shall be the presiding officer of the Board of Governors.

SECTION 2. *Oath of Office.* Before entering upon the duties of their office, the officers and the members of the Board of Governors shall be duly sworn in at the annual meeting, according to such form of oath as the House of Delegates shall prescribe.

SECTION 3. *Quorum.* A majority of the Board of Governors shall constitute a quorum.

SECTION 4. *Power of Board of Governors.* Subject in all respects to the authority and direction of the House of Delegates and between its meetings, the Board of Governors shall be the administrative board of the Association and shall have the power and authority to do and perform all acts and functions which the House of Delegates itself might do or perform, not inconsistent with the Constitution and By-Laws or with any action taken by the House of Delegates.

ARTICLE VI

Officers of the Association

The following officers shall be elected at each annual meeting of the House of Delegates, to serve for the year to end with the adjournment of the next annual meeting of the House of Delegates:

A President, who shall not thereafter be eligible for election to that office;
A Vice-President from each federal judicial circuit;
A Chairman of the House of Delegates, chosen from the membership of the House of Delegates;
A Secretary; and
A Treasurer.

The Board of Governors may elect, and may prescribe the duties of, one or more Assistant Secretaries, an Executive Secretary, and such other employees as it may determine, each of whom shall hold office at the pleasure of the House of Delegates or of the Board of Governors. The Executive Secretary or other employees need not be members of the Association.

ARTICLE VII

Nomination of Officers and Certain Delegates

SECTION 1. *Nominations by State Delegates.* The State Delegates from each State (and the Delegate from the territorial group) shall meet, not later than seventy days before the opening of the annual meeting in each year, and shall make, and promptly announce and publish, their nominations for the office of President, Vice-Presidents, Chairman of the House of Delegates, Secretary, and Treasurer, and for the members of the Board of Governors to be elected in that year, and for five delegates to be chosen by the Assembly for membership in the House of Delegates, of which delegates not more than one shall come from a single State. The time and place of the meeting of the State Delegates shall be fixed by the Chairman of the House of Delegates. Not less than twenty days' written notice of such meeting shall be sent by the Chairman of the House of Delegates to each State Delegate. The Chairman shall act as the presiding officer of all meetings of State Delegates, and the Secretary of the Association shall act as Secretary of such meetings. A majority of the State Delegates present at any meeting shall be entitled to make any nominations.

SECTION 2. *Other Nominations.* Not later than forty days before the opening of the annual meeting, two hundred members of the Association in good standing of whom not more than one hundred may be accredited to any one State, may file with the Secretary a nominating petition, duly signed, making other nominations for any office to be filled at the next annual meeting. The Secretary shall cause all nominations in whatever manner made to be published in the next issue of the AMERICAN BAR ASSOCIATION JOURNAL and shall certify such nominations to the House of Delegates.

SECTION 3. *Choice of Board of Governors by Circuits.* There shall be a member of the Board of Governors chosen from each federal judicial circuit, each of whom shall at the time of his nomination be a member of the House of Delegates. In 1936, a member of the Board of Governors shall be elected from each the first, second, sixth, and tenth circuits; in 1937, from the third, fifth and ninth circuits; in 1938, from the fourth, seventh and eighth circuits; and thereafter their successors shall be elected for three-year terms to end with the adjournment of the annual meeting following the expiration of such terms. The District of Columbia shall be considered as a part of the fourth circuit. The members of the Executive Committee whose terms do not expire in 1936 shall continue in office as members of the Board of Governors until the expiration of the terms for which they were elected. In 1936, nominations shall be made by the State Delegates and the election shall be by the Assembly. After the year 1936, all elections upon nominations made as hereinbefore provided shall be by the House of Delegates on the first day of its annual meeting.

SECTION 4. *Optional Method of Nominating and Electing Member of Board of Governors from a Circuit.* If at any time the State Bar Associations of a majority of the States in a federal judicial circuit decide that the members of the Board of Governors from that circuit shall be elected by mail ballot and in writing notify the Board of Elections of that decision, the member of the Board of Governors from such circuit shall thereafter be nominated by the State Delegates from such circuit, within the

times prescribed for the nomination of State Delegates, and like opportunity shall be given for the making and filing of other nominations. Thereafter the Board of Elections shall send to all members of this Association in such circuit a printed ballot for the election of such members of the Board of Governors; and the election in and for such circuit shall be conducted in the same manner prescribed for the election of State Delegates by mail ballot. This optional method of nominating and electing a member of the Board of Governors from a circuit may be discontinued at any time by a majority vote of the State Bar Associations in such circuit.

SECTION 5. *Board of Elections.* The Board of Governors shall select a Board of Elections composed of three disinterested members of the Association not members of the House of Delegates, which Board shall supervise and conduct all nominations and elections held, by mail ballot of the members of the Association and any referendums. The Chairman of such Board of Elections shall be a member of the highest court of law in a State. The Board of Elections shall have power to make and publish rules and regulations, not inconsistent with the Constitution and By-Laws of the Association, to govern the conduct of such nominations and elections, to insure a secret ballot and an accurate and prompt count and report of the votes cast.

ARTICLE VIII

Sections

SECTION 1. *Purpose of Sections.* The work of the Association and Sections shall be at all times in furtherance of the unity of the Law as a science and in the interest of the profession and the performance of its public obligations. Consistently therewith, there shall be the following sections for carrying forward the work of the Association:

Section of Legal Education and Admissions to the Bar;
Section of Patent, Trade-Mark and Copyright Law;
Judicial Section;
Section of Public Utility Law;
Section of Bar Organization;
Section of Criminal Law;
Section of Mineral Law;
Section of Municipal Law;
Section of Insurance Law;
Section of International and Comparative Law;
Section of the Junior Bar;
Section of Real Property Law.
And such other Sections as may be authorized by the House of Delegates upon the recommendation of the Board of Governors.

SECTION 2. *Section By-Laws.* Each section shall have power to adopt and amend By-Laws, not inconsistent with the Constitution and By-Laws of the Association. Such By-Laws or amendments thereof shall become effective when approved by the House of Delegates, upon the recommendation of the Board of Governors. Each Section may determine and define by its By-Laws the qualifications for membership therein.

SECTION 3. *Section Officers and Council.* Each Section shall have a Chairman, Vice Chairman and Secretary, and a Council, which shall consist of the Chairman, Vice Chairman and Secretary, all of whom shall be members *ex officio,* together with such number of other members as may be provided by the Section By-Laws.

SECTION 4. *Reports of Sections and Committees.* Each Section and Committee of the Association shall, on or before such date in each year as shall be fixed by the Board of Governors, prepare and transmit to the House of Delegates, through the Board of Governors, its written report covering its work for such year and its recommendations, if any. Each Section and Committee of the Association shall have such powers and duties, not inconsistent with the Constitution and By-Laws of the Association, as may be determined by the House of Delegates or by the Board of Governors when the House of Delegates is not in session. No report, recommendation, or other action, of any Section, or of any Committee of the Association or Section shall be or be considered as, the action of the Association, unless and until the same has been approved or authorized by the House of Delegates or by the Board of Governors.

SECTION 5. *Section Dues.* The enrolled members of any Section of the Association may be required to pay annual Section Dues, in such an amount and for such purposes, as the House of Delegates may from time to time determine.

ARTICLE IX

Reports and Publications

SECTION 1. *Issuance and Distribution.* The Annual Reports of the Association shall be free of charge to members in good standing. All other publications of the Association and of its Sections and Committees shall be issued and distributed upon such terms and conditions as the Board of Governors shall provide.

SECTION 2. *Informative Services to Members.* It shall be an especial duty of the Board of Governors, in co-operation with the appropriate Sections and Committees of the Association, to develop methods of making the Association and its publications useful and of practical assistance to the members in their professional work. The Board of Governors shall, from time to time, prepare and submit to the House of Delegates specific plans to such end.

ARTICLE X

Termination of Membership

SECTION 1. *Resignation of Members.* A member not in default in payment of dues, and against whom no complaint or charge is pending, may at any time file his resignation in writing with the Secretary, and it shall become effective as of the date it was filed when accepted by the Board of Governors. The Board of Governors may reinstate any member who has resigned, on his written application for reinstatement, without re-electing him, if his application is filed within one year after the acceptance of his resignation by the Board of Governors.

SECTION 2. *Expulsion and Reinstatement of Members.* The Board of Governors may censure, sus-

pend or expel any member for cause after a hearing, or may suspend or drop from membership any member for non-payment of dues. Any member suspended, expelled or dropped from membership may be reinstated by the affirmative vote of a majority of the members of the Board of Governors.

SECTION 3. *Cessation of Property Interest on Termination of Membership.* All right, title and interest, both legal and equitable, of a member in and to the property of the Association shall cease and determine in the event of any or either of the following: (*a*) the expulsion of such member; (*b*) the striking of his name from the roll of members; (*c*) his death or resignation; (*d*) his transfer to the special list of members.

ARTICLE XI

Incorporation

The Association by affirmative vote of at least three-fourths of the members present at any session of an annual meeting of the Assembly, provided at least two hundred members are present at such session, may, with the concurrent action of a majority of the House of Delegates, determine to make application to become a corporation without shares of stock under the general laws, or by special charter, of any State or of the United States, and in case of such determination, the Association by such vote may authorize the President and the Board of Governors to have done all acts necessary and appropriate to accomplish such incorporation, and when it shall be accomplished to transfer all of the Association's property interests to such corporation.

ARTICLE XII

Adoption and Amendment of By-Laws

By-Laws may be adopted, amended, or rescinded at any annual meeting of the Association by a two-thirds vote of the members of the Assembly present at the session at which the same is voted on and a two-thirds vote of the members present at a meeting of the House of Delegates at which the same is voted on; provided that notice of the proposed action shall have been given by the Secretary to the members of the Association and to the members of the House of Delegates, either by mail or by publication in the American Bar Association Journal, at least thirty days before the meeting at which such action is proposed to be taken.

ARTICLE XIII

Amendment of Constitution

This Constitution may be altered or amended only by a vote of three-fourths of the members present at any session of the Assembly at any annual meeting but no such change shall be made unless at least two hundred members shall be present at such session nor without the concurrent action of a two-thirds vote of the House of Delegates, or unless notice of the proposed alteration or amendment shall have been given by the Secretary to the members of the Association and to members of the House of Delegates, either by mail or by publication in the American Bar Association Journal at least thirty days before the meeting at which the amendment is offered.

BY-LAWS

ARTICLE I

Election and Classes of Membership

SECTION 1. *Nomination of Members.* Each State Delegate shall appoint a membership committee of five members of the Association for his respective State or Territory. Applications for membership shall be considered by such committee only upon endorsement of a member of the Association in good standing. Upon the approval of a majority of the membership committee for the State or Territory in which the applicant resides, he shall be deemed nominated for membership.

SECTION 2. *Election of Members.* All nominations made pursuant to Section 1 hereof shall be reported to the Board of Governors for action. Two negative votes in the Board of Governors shall prevent an applicant's election.

SECTION 3. *Life Membership.* Any person eligible for membership in the Association and elected as above provided, and any member of the Association heretofore elected, may become a life member of the Association upon written notice to the Treasurer and payment of the sum of $100 for such life membership. Such payment when made shall be in full of all dues to the Association during the life of such member. A life member shall have all the privileges of an active member of the Association. All sums paid for life membership in the Association shall be invested by the Treasurer and the income therefrom shall be used for the general purposes of the Association, unless otherwise provided by further amendment hereof.

SECTION 4. *Honorary Membership.* Persons of distinction who are members of the legal profession of another country, but not members of the Bar of any State or Territory of the United States, may be elected by the House of Delegates or by the Board of Governors to honorary membership in the Association, without formal nomination or certification. Honorary members shall be entitled to the privileges of the floor of the assembly and the sections during meetings, but shall not be entitled to vote; and they shall pay no dues and shall have no right, title or interest in any of the property of the Association.

SECTION 5. *Special List of Members.* Any member of the Association who shall have attained the age of seventy years, and who has been a member of the Association in good standing continuously during at least twenty-five years last past, shall, upon request, have his name placed upon a special list of members, and shall thereafter be exempt from further payment of Association dues.

ARTICLE II

Association Dues

SECTION 1. *Scale of Dues.* Each member shall pay to the Association as its dues $8.00 for the period of each year from July first to June thirtieth following, payable on July first of each year in advance, which sum shall include the individual subscription of the member to the AMERICAN BAR ASSOCIATION JOURNAL, which is $1.50 per year; provided, however, that during the first five years after his original admission to the Bar, the dues of a member shall be $4.00 per year.

SECTION 2. *Pro Rata Payment.* A newly elected member shall pay in advance **his association** dues prorated for the balance of such year in which he is elected, computed on a quarterly basis, beginning with the quarter of the year in which **he is elected.**

SECTION 3. *Default in Payment.* No person shall be in good standing or be qualified to exercise or be entitled to receive any privilege of membership who is in defaut in the payment of **his association** dues for six months. The **Board of Governors,** in its discretion, may remit the dues of any member under special circumstances.

SECTION 4. *Honorary Members.* This Article shall not apply to honorary members of the Association or to members who have been placed on the special list pursuant to Section 5 of Article I of the By-Laws.

SECTION 5. *Joint Dues.* **In case any State or Local Bar Association shall propose the establishment of a system of joint dues between itself and the American Bar Association, under which all of its members become members of the American Bar Association, as well as of such State or Local Bar Association, the Board of Governors shall have the power, subject to the approval of the House of Delegates, to agree upon, establish and put in force such a system of joint dues, determine the total amount of such joint dues, fix the division of the same between the two Associations, and determine the method of billing and collection therefor.**

SECTION 6. *Form of Application for Membership.* The **Board of Governors** shall prescribe the form of application for membership and endorsement of nominations; and it may direct that payment on account of dues shall accompany the application or nomination.

SECTION 7. *Certificate of Membership.* **Each member of the Association shall receive and shall be entitled to retain while he is a member in good standing, a certificate of membership in the Association.**

SECTION 8. *Default in Payment of Association Dues.* If any member is in default in the payment of his **Association** dues for a period of six months after the same shall **have** become payable, the Treasurer shall forward to such member a copy of this By-Law, and shall notify such member that unless such dues are paid within one month thereafter such default will be reported to the **Board of Governors.** Upon such report being made to the **Board of Governors,** it may, without further notice, cause the name of such member to be stricken from the roll for non-payment of dues, and the membership, and all rights in respect thereto of such member shall thereupon cease.

ARTICLE III

Annual Meeting

SECTION 1. *Program.* The program at the annual meeting of the Association shall be arranged by the **Board of Governors,** and notice thereof shall be given to the members **of the Association** at least thirty days before the meeting. **The first and organization meeting of the House of Delegates shall be held on August .., 1936.**

SECTION 2. *President's Address.* At each annual meeting of the Association the President shall deliver an address **before the Assembly and the House of Delegates in joint session,** upon such topic as he may select with the approval of the **Board of Governors.** The American flag shall be displayed at all meetings of the Association.

ARTICLE IV

Reports of Committees

When a printed report of a Committee recommends action by the Association, the recommendation shall be set forth in italics or underscored type, or in some other form which will readily distinguish the recommendations from the body of the report. The Chairman of the Committee may, **if requested,** state to the meeting the substance of such report and recommendations.

ARTICLE V

Resolutions—Procedure

SECTION 1. *Limitation on Speaking.* No person shall speak **in the assembly** more than ten minutes at a time nor more than twice on one subject, except as indicated on the program prepared by the **Board of Governors.**

SECTION 2. *Resolutions.* Every resolution **presented to the Assembly** shall be in writing. Unless **a resolution presented to the Assembly** is of a formal character or presented by a committee, **such resolution** shall be referred by the Chair on presentation, without debate, to **the Resolutions Committee** for consideration and report. **Only** resolutions which are favorably reported by a committee or adopted by the Assembly shall be published in the proceedings of the meeting.

SECTION 3. *Complimentary Resolutions.* No resolution complimentary to an officer or member for any services performed, paper read or address delivered, shall be considered by **the Assembly, the House of Delegates, or any Section of the Association.**

SECTION 4. *Privileges of Floor.* Members of the legal profession of any foreign country or of any State, who are not members of the Association, may be admitted to the privileges of the floor at any meeting of the **Assembly.**

ARTICLE VI

House of Delegates

SECTION 1. *Reference of Matters to Members of House of Delegates.* **The House of Delegates or the Board of Governors may refer to any member of the House of Delegates, for information, advice or action, any matter pertaining to the welfare of the Association, in the State or locality from which such member comes.**

SECTION 2. *Information for State and local Bar Associations.* **The Chairman of the House of Delegates shall promptly transmit to each State and participating local Bar Association reports and information as to all actions taken by the House of Delegates.**

ARTICLE VII

Custody of Papers, Addresses and Reports

All papers, addresses and reports read before the **Assembly or House of Delegates** or submitted to it,

shall be lodged with the Secretary and become the property of the Association, and shall not be published unless by the express direction of the **Board of Governors.**

ARTICLE VIII

Officers of Association

SECTION 1. *Duties.* **The officers of the Association shall perform the duties usually performed by such officers, together with such duties as shall be prescribed by the Constitution or By-Laws or by the House of Delegates or Board of Governors.**

SECTION 2. *Term of Office and Vacancies.* The terms of office of all persons elected at any annual meeting shall commence at the adjournment of such meeting. **The Chairman of the General Council now in office shall be and act as the Chairman of the House of Delegates until his successor has been elected and has qualified.**

Vacancies in any office, except **the House of Delegates** and the elective members of the **Board of Governors** occurring between the annual meetings, shall be filled by the **Board of Governors.**

SECTION 3. *Officers' Reports.* Each officer of the Association shall make an annual report to the **Association which shall be filed with the House of Delegates.**

SECTION 4. *Audit of Treasurer's Report.* The Treasurer's report shall be examined and audited annually by a licensed public accountant designated by the President before its presentation.

ARTICLE IX

The American Bar Association Journal

The AMERICAN BAR ASSOCIATION JOURNAL shall be conducted by a Board of Editors, which shall consist of six members, including the Editor-in-Chief, who shall be elected by the other members of the board. Upon his election as Editor-in-Chief he shall become a member of the Board of Editors. He shall hold office as Editor-in-Chief at the pleasure of the Board of Editors and when he ceases to be Editor-in-Chief he shall cease to be a member of the Board of Editors. The Board of Editors may by election fill vacancies in said board, appoint a Managing Editor and such other employees as they deem necessary or advantageous and they shall have the management of the JOURNAL and of its financial affairs, reporting their action to the **Board of Governors,** but the **Board of Governors** may by a vote of the majority of all its members disapprove or rescind any action or appointment of the Board of Editors. All its revenues from whatever source derived shall be transmitted forthwith to the Treasurer of the Association and all its bills shall be paid by the Treasurer on presentation of proper vouchers.

ARTICLE X

Committees

SECTION 1. *Appointment and Tenure.* The following **Standing** Committees shall be appointed annually by the President, each to consist of five members (unless otherwise specifically indicated herein), to serve for the year ensuing and until their respective successors are appointed. The President shall designate the Chairman and shall notify the members of the committee of their appointment:

On Admiralty and Maritime Law;
On Aeronautical Law;
On American Citizenship, **to consist of ten members; one from each judicial circuit;**
On Commerce;
On Commercial Law and Bankruptcy;
On Communications;
On Federal Taxation, to consist of seven members;
On Jurisprudence and Law Reform, to consist of **ten** members, **one from each federal judicial circuit;**
On Labor, Employment and Social Insurance;
On Legal Aid Work;
On Noteworthy Changes in Statute Law;
On Professional Ethics and Grievances, to consist of **ten** members.
On Publicity;
On State Legislation, to consist of two members in each State, with a **Chairman of the whole Committee;**
On Unauthorized Practice of the Law.

In addition to the aforesaid Standing Committees, the President shall appoint a **Resolutions Committee, a Reception Committee, and** such special committees as the **House of Delegates or the Board of Governors** may authorize. Each of such special committees shall consist of five members (unless otherwise specifically directed by **the House of Delegates or the Board of Governors) and shall** serve for one year ensuing and until their respective successors are appointed. Such committees shall perform the duties prescribed by the **House of Delegates or the Board of Governors.** The President shall designate the Chairmen of such committees and shall give notice to the persons appointed.

In order to make available to the following committees a cross section of representative opinion of the legal profession throughout the United States, each of the committees on American Citizenship, Commerce, Federal Taxation, Jurisprudence and Law Reform, Labor, Employment and Social Insurance, Professional Ethics and Grievances, and Unauthorized Practice of the Law, shall have an Associate and Advisory Committee, composed of one member from each State, to be appointed by the President after consultation with the President of the State Bar Association of such state. Such Associate and Advisory Committee shall function under the supervision of the Committee of the Association to which it is related, and shall perform such duties as may be requested by the Committee of the Association, subject to the control of the House of Delegates.

SECTION 2. *Vacancies.* The President shall have power to fill vacancies in any committee.

SECTION 3. *Quorum.* A majority of the members of any committee shall constitute a quorum.

SECTION 4. *Committee on Admiralty and Maritime Law.* The Committee on Admiralty and Maritime Law shall be charged with the duty of considering bills introduced in Congress, decisions of the courts, and projects of international conferences which affect the maritime laws of the United

States, and of recommending such changes in such laws as are desirable.

SECTION 5. *Committee on Aeronautical Law.* The Committee on Aeronautical Law shall have power to consider and report on all questions pertaining to the law of aeronautics.

SECTION 6. *Committee on American Citizenship.* The Committee on American Citizenship **shall consist of one member from each federal judicial circuit** and it shall be its duty to inspire in the people of the United States a proper appreciation of the privileges as well as the duties of American citizens.

SECTION 7. *Committee on Commerce.* The Committee on Commerce shall study the existing status of federal and state laws and proposed amendments thereto pertaining to or affecting interstate or foreign commerce, recommend to the Association as occasion may require such action by the Association as may be deemed proper, and consider and report on such other matters as in the judgment of the committee are reasonably pertinent to the subject of foreign and interstate commerce and the laws relating thereto.

SECTION 8. *Committee on Commercial Law and Bankruptcy.* The Committee on Commercial Law and Bankruptcy shall have power to consider and report on all matters having to do with commercial law and bankruptcy and the practice and administration thereof, other than matters within the field of interstate or foreign commerce.

SECTION 9. *Committee on Communications.* The Committee on Communications shall have power to consider and report on all questions pertaining to laws and treaties governing the transmission of intelligence through the application of electrical energy or other use of electricity whether by wire or wireless.

SECTION 10. *Committee on Federal Taxation.* **The Committee on Federal Taxation shall study existing and proposed federal statutes relating to internal revenue, relation of the same to state tax laws and revenues and shall secure information, advice, criticism and comment upon such statutes and the regulations issued thereunder; and shall formulate and submit its recommendations and such amendments, if any, to such laws and regulations as the Committee may deem advisable.**

SECTION 11. *Committee on Jurisprudence and Law Reform.* The Committee on Jurisprudence and Law Reform shall have the power, except as to matters referred to special committees, to consider and report concerning all matters of jurisdiction, and procedure in the state and federal courts, including reforms of the substantive law, **and such other related matters as may be referred to it by the House of Delegates or the Board of Governors.**

SECTION 12. *Committee on Labor, Employment and Social Insurance.* **The Committee on Labor, Employment and Social Insurance shall study and report respecting existing and proposed laws in the federal sphere concerning labor, employment and social insurance; and shall formulate and submit such recommendations concerning the same as the Committee may deem advisable.**

SECTION 13. *Committee on Legal Aid Work.* It shall be the duty of the Committee on Legal Aid Work (1) to maintain a continuing study of the administration of justice as it affects the poorer citizens and immigrants throughout the country, (2) to promote remedial measures intended to assist poor persons in the protection of their legal rights, (3) to encourage the establishment and efficient maintenance of legal aid organizations, and (4) to cooperate with other agencies, both public and private, interested in these objects.

SECTION 14. *Committee on Noteworthy Changes in Statute Law.* The Committee on Noteworthy Changes in Statute Law shall report annually to the Association the noteworthy changes in the law resulting from statutes passed by the Congress and by state legislatures.

SECTION 15. *Committee on Professional Ethics and Grievances.* **The Committee on Professional Ethics and Grievances shall:**

(*a*) **Formulate and recommend standards and methods for the effective enforcement of high standards of ethics and conduct in the practice of law as a profession; develop and recommend improved disciplinary methods and procedures; co-operate with the disciplinary tribunals or committees established by courts or other public authority; consider the Canons of Ethics of the Legal Profession and of Judicial Officers and the observance thereof; and make recommendations for amendments to or clarifications of the Canons of Ethics when the same may appear to be advisable;**

(*b*) **Upon request, advise or** assist State and local Bar Associations in their activities in respect to the professional conduct of lawyers and the ethics of the profession; make such investigations of professional conduct and of abuses in connection with the practice of law as may be directed by the **House of Delegates or the Board of Governors;** furnish information and make recommendations on the foregoing subjects to the **House of Delegates or the Board of Governors; provided, however, that where investigations of facts are involved in any pending matter, the Committee may refer the same, for investigation and report in first instance, to the appropriate tribunal or Committee within the State or to the appropriate State or local Bar Association;**

(*c*) Be authorized, when consulted by any member of the Association or by any officer or committee of a State or local Bar Association, to express its opinion concerning proper professional or judicial conduct, but such opinions shall not deal with questions of judicial decision or judicial discretion, and shall not be given until considered by the committee and approved by a majority thereof.

(*d*) Be authorized **to consider all information as to** the professional conduct and, except as hereinafter limited, the judicial conduct of any member of the Association **and to proceed** in accordance with rules adopted and approved as provided in sub-paragraph (e) of this section, **upon its own motion or upon complaint preferred. The committee shall not consider questions of judicial decision or dis-**

cretion. After a hearing thereon, the committee may recommend to the **Board of Governors** the public or private censure or expulsion of such member and such censure or expulsion shall become effective on the **Board of Governors'** approval of such recommendation.

(*e*) Be authorized to adopt such rules as it may deem desirable concerning the methods and procedure to be used in expressing opinions, in making investigations, in the hearing of complaints and taking of testimony. Such rules shall not become effective until approved by the **Board of Governors.**

SECTION 16. *Committee on Resolutions.* **The Committee on Resolutions shall consist of such number of members as shall be authorized by the Board of Governors and the Committee shall be appointed by the President and shall be the tribunal for consideration and report, pursuant to Article IV, Section 2 hereof, upon such resolutions as shall be offered by members of the Association for consideration by the Assembly.**

SECTION 17. *Committee on State Legislation.* It shall be the duty of the members of the Committee on State Legislation, **under the direction of its Chairman,** to endeavor to secure the enactment in their respective states of legislation approved by the Association and recommended by it to the State legislatures for adoption, and to co-operate with the Commissioners from their State in the National Conference of Commissioners on Uniform State Laws, in securing the adoption in their State of the Acts recommended by the Conference and approved by the Association.

SECTION 18. *Committee on Unauthorized Practice of the Law.* The Committee shall keep itself and the Association informed with respect to the unauthorized practice of law by lay agencies and the participation of attorneys therein, and concerning methods for the prevention thereof. The committee shall seek the elimination of such unauthorized practice and participation by such action and methods as may be appropriate for that purpose, including cooperation with, and assistance and advice to state, district and local bar associations and other organizations.

SECTION 19. *Conference of Committees with Commissioners on Uniform State Laws.* Whenever a committee is considering any subject respecting State legislation, it shall confer with the National Conference of Commissioners on Uniform State Laws.

SECTION 20. *Reception Committee.* There shall be appointed annually by the President a Reception Committee, whose duty shall be to attend immediately before and at the opening of the first day's session of the annual meeting to receive members and delegates and introduce them to each other.

SECTION 21. *Meetings of the Committees.* **Each Committee of the Association, unless otherwise directed by the House of Delegates, or the Board of Governors, shall hold a meeting during the annual meeting of the Association.**

SECTION 22. *Expenses of Board of Governors and Committees.* Traveling and other necessary expenses incurred by the **Board of Governors** or by any Committee of the Association during the interim between annual meetings, **upon presentation of proper vouchers therefor in form approved by the Board of Governors,** shall be paid by the Treasurer out of such appropriations as the **House of Delegates or Board of Governors** shall have made for such purpose. Vouchers for such expenditures incurred by the **Board of Governors** shall be approved by the **Chairman of the House of Delegates.** Vouchers for such expenditures incurred by any committee of the Association shall be approved by the Chairman of such committee. **No appropriation shall be made for traveling expenses of any member of any associate or advisory committee.**

SECTION 23. *Printing of Reports of Committees.* All committees may have their reports printed by the Secretary before the annual meeting of the Association unless otherwise ordered by the **Board of Governors;** and any such report containing any recommendation for action by the Association, shall be printed, together with a draft of a bill embodying the views of the committee, whenever legislation shall be proposed; but any matter previously printed and distributed may be omitted in the discretion of the **Board of Governors.** Such reports shall be distributed by mail by the Secretary to all members of the Association at least thirty days before the annual meeting at which such report is proposed to be submitted; provided, however, that when a Section of the Association or the National Conference of Commissioners on Uniform State Laws reports the work and recommendations of such Section or Conference such report may be considered or acted upon at any meeting of the Association immediately following or held contemporaneously with such meeting of such Section or Conference, without being previously distributed as above provided.

ARTICLE XI

Intervention in Litigation

No Section or Committee shall assume to represent the Association in any court or in a controverted procedure before any other tribunal unless authorized so to do by the **House of Delegates or by the Board of Governors;** or, in case of emergency, by the President.

ARTICLE XII

Sections—General Regulations

SECTION 1. *Meetings of Sections.* Each Section shall meet annually in connection with the annual meeting of the Association and immediately preceding or during the period of such annual meeting, as the **Board of Governors** may direct.

SECTION 2. *Publication of Proceedings of Sections.* The proceedings of any or all of the Sections may be published from time to time, in the discretion of the **Board of Governors.**

SECTION 3. *Membership of Sections.* Any member of the Association may enroll himself as a member of any Section provided he meets the requirements in other respects of the By-Laws of such Section.

SECTION 4. *Appropriations to Sections.* Appropriations may be made from time to time by the **House of Delegates or the Board of Governors** to any Section, and to the National Conference of Commissioners on Uniform State Laws; but the

financial liability of the Association to the Sections or any of them, or to the National Conference of Commissioners on Uniform State Laws, shall be limited to such appropriations as may be made for them and shall cease upon payment by the Treasurer of the Association on account of the Sections or of the Conference of the amount so appropriated.

SECTION 5. *Conference of Sections with National Commissioners on Uniform State Laws.* Whenever a Section is considering any subject respecting proposed state legislation, it shall confer with the National Conference of Commissioners on Uniform State Laws.

Many of the facts and considerations pertinent to the development of a plan for a representative and improved organization of the Bar, were set forth by the President of the American Bar Association in an address before The State Bar of California, on September 19, 1935. Copies of that address, for consideration in connection with the plan now submitted, may be obtained, together with copies of this plan in pamphlet form, in any desired number, on request to the American Bar Association.

Professional Ethics Committee Rules Organization and Offer of National Lawyers Committee Not Unethical—Opinion in Full

THE Committee on Professional Ethics and Grievances of the American Bar Association for the year 1935-36 held its first meeting on Nov. 15-17 in Columbus, Ohio, in the offices of the Secretary of the Committee, Dean Herschel W. Arant, of the Ohio State University College of Law. Three new faces were present at the meeting: Mr. Robert T. McCracken, of Montgomery and McCracken, Philadelphia, Pennsylvania, the new Chairman; Judge James F. Ailshie, of the Supreme Court of the State of Idaho, Boise, Idaho; and Mr. Philbrick McCoy, Counsel for the State Bar of California, Los Angeles, California. The other members present were: Hon. Arthur E. Sutherland, former Justice of the Supreme Court of the State of New York, Rochester, New York; Hon. George B. Martin, former United States Senator from the State of Kentucky, Catlettsburg, Kentucky; and Dean H. W. Arant. The Honorable Orie L. Phillips, Senior Judge of the Tenth Circuit Court of Appeals, Denver, Colorado, was unable to be present.

The Committee held meetings morning, afternoon and evening, for three days. It disposed of a vast amount of more or less routine business, and promulgated Opinion No. 148, upholding the right of lawyers to offer publicly free legal services to persons in need of such services and unable to pay for them. Two or three important disciplinary matters were put over until the next meeting, because of the fact that disciplinary proceedings involving the members against whom complaints were lodged are still pending in the courts. The Committee also postponed expressing an opinion, in answer to a request, as to the ethical propriety of certain conduct on the part of lawyers, because the propriety of the conduct referred to may be determined by the court in pending litigation.

There was a discussion of the problem of publication of the Committee's Opinions in a more compact and accessible form, and a sub-committee of the Committee was appointed to undertake the job of putting them together for publication in a single volume, which will include a Digest and a "Shepardization" of the Opinions. The Committee's next meeting will be held in Chicago, Illinois. The dates tentatively set for the meeting are February 14, 15 and 16, 1936.

The opinion as to the propriety of certain activities of the National Lawyers' Committee affiliated with the American Liberty League (No. 148) has excited wide interest. It is therefore published in full, along with the following introductory matter which explains how the question came before the Committee.

Mr. Carl N. Davie, of Atlanta, Georgia, who has been a member of the Association in good standing since 1923, addressed a communication to the Association, under date of September 25, 1935, which set forth the following excerpt from a press dispatch appearing in the *Atlanta Constitution* of September 20, 1935:

"LIBERTY LEAGUE PLANS FREE LAWYER SERVICE

"Anyone who 'Bucks' New Deal to get counsel without charge

"WASHINGTON, Sept. 19—(UP).—A vast 'free lawyer' service for firms and individuals bucking New Deal laws on constitutional grounds was an indicated aim of the American Liberty League as its legal talent today found the National labor relations act unconstitutional.

"President Jouett Shouse said the league was considering legal defense aid for persons and companies unable to finance litigation over New Deal laws which are found by the league's lawyers to be unconstitutional.

"Such action by the league would be similar to that of the Civil Liberties Union, which supplies lawyers for the defense in the Scottsboro negro assault case."

Concerning the contents of this press dispatch, Mr. Davie propounded to the Association the following questions, and asked the opinion of the Association's Committee on Professional Ethics and Grievances concerning them:

"1—Is not such an advertisement encouraging litigation which is not only reprehensible according to the ethics of the profession, but which also violates the criminal provisions of the statutes in nearly every state in the union?

"2—With what grace can those of us who are engaged in similar litigation charge fees when our clients by such widespread advertisement are advised that they can get such legal advice and such legal defense free of charge, and under such circumstances do you think we could ever collect from our clients fees commensurate with the work we are required to do?

"3—Don't you think it should be the business of the Association to repudiate such tactics, such advertisements, and that even if the lawyers who have formed an organiza-

tion similar to the 'Civil Liberties Union,' are of prominence and eminence in the profession?"

Under Section 13(b) of Article VIII of the Association's By-laws, Mr. Davie as a member of the Association was entitled to submit such an inquiry to the Association and its Committee. Upon its receipt by the Secretary of the Association, it was by him duly referred to the Committee on Professional Ethics and Grievances. Other members of the Association asked the Association for information and opinion on the same subject.

Under the practice of the Association and its Committee, such a communication and request for opinion did not constitute or involve a "complaint" against members of the Association, did not involve a hearing or the filing of "charges," and did not involve inquiry by the Committee as to the truth or accuracy of the statement of facts upon which the communication is based.

The Secretary of the Committee on Professional Ethics and Grievances communicated informally with the Chairman of the National Lawyers' Committee referred to in Mr. Davie's communication, and invited that group of lawyers or its Chairman to submit to the Committee on Professional Ethics and Grievances any statement or information it saw fit as to the matters to be considered. Concerning the statement quoted by Mr. Davie from the press dispatch in the *Atlanta Constitution*, the Chairman of the National Lawyers' Committee of the Liberty League wrote to the Association as follows:

"No such statement was ever authorized by the National Lawyers Committee or any member thereof and I am authorized by Mr. Jouett Shouse to say that he did not make the statement above quoted and attributed to him and that he has never made or authorized any statement inconsistent with the statement of the Hon. James M. Beck hereafter referred to.

"Hon. James M. Beck of our Committee in his radio address on October 16, 1935, said:

" 'They (The National Lawyers Committee) have expressed, and will continue to express their judgment from time to time as to the validity of legislation, and if and when any American citizen, however humble, is without means to defend his constitutional rights in a court of justice, one or more of these lawyers will, without any compensation from any source, defend the rights of the individual, and in this way carry out, in the most effective way, their oath to support, maintain and defend the Constitution.' "

The Committee was later requested to render an opinion upon the propriety of the statement made in Mr. Beck's radio address. The opinion reads as follows:

OPINION 148

Organization by lawyers and expression of their views on public questions, including the validity of legislation, is not unethical.

Offering publicly to render legal services without charge to citizens who are unable to pay for them is not unethical.

A number of members of the American Bar Association have requested the opinion of the Committee upon the following facts:

An association has been organized under the title of the American Liberty League. One of the adjuncts of that Association consists of a group of lawyers known as the National Lawyers Committee, presently fifty-eight in number and including prominent counsel from various cities and towns throughout the United States. Under date of October 25 one of these attorneys, in a radio address, while describing the work of the Committee which had just published an opinion as to the constitutionality of the National Labor Relations Act, made the following statement:

ROBERT T. MCCRACKEN, Philadelphia,
Chairman Association's Committee on Professional Ethics and Grievances.

"If and when any American citizen, however humble, is without means to defend his constitutional rights in a court of justice, one or more of these lawyers will, without any compensation from any source, defend the rights of the individual."

The question propounded is whether or not this statement with its implications offends any of the Canons of Ethics of the American Bar Association.

The Committee's opinion was stated by Mr. MCCRACKEN, Messrs. Sutherland, Martin, Arant, Ailshie and McCoy concurring. The Honorable Orie L. Phillips was absent and did not participate.

In the view of the Committee, the question involves more than the mere offer contained in the foregoing excerpt from the address. It comprises a consideration of the proposed functioning of the National Lawyers Committee, which, as described in the foregoing address and in a number of pamphlets circulated by the American Liberty League, consists in the main of two proffers of service, (a) the preparation and dissemination from time to time of opinions upon legislation as the same is enacted by the Congress or perhaps the legislatures of the several states with particular reference to the constitutionality of such legislation, and (b) voluntary defense of American citizens unable financially to retain counsel when such citizens believe their constitutional rights to be imperilled by such legislation.

The right of citizens to organize and to give expression to views which they entertain upon public questions is one of the unalienable rights which Americans enjoy, and lawyers enjoy that right as citizens in common with their fellow men. The Committee on

Professional Ethics and Grievances of the American Bar Association expresses no opinion as to the soundness of the conclusions reached by the National Lawyers Committee of the American Liberty League that the National Labor Relations Act is unconstitutional, but we do affirm that lawyers thus associated have the right to express their views in that way. Voltaire said, "I wholly disapprove of what you say, but will defend to the death your right to say it."

Moreover, in upholding their right to organize and express and promulgate their views we need not assume that these lawyers are actuated solely by altruistic motives. It would be extraordinary indeed if some of the lawyers in the list do not have some clients whose rights may be adversely affected by the legislation which the lawyers condemn, but their right to organize and declare their views cannot for that reason be denied, and no ethical principle is thereby violated.

The subject discussed is one the importance of which can hardly be over-estimated, and it is well that it can be discussed with the dignity and learning and strength which characterize the publications which have been brought to our attention.

With equal assurance we uphold the right of lawyers and others who are in agreement with the policies set forth in the legislation complained of to organize and express themselves. Lawyers, farmers and mechanics alike enjoy the right of free speech and a free press and the right peaceably to assemble and petition the government for a redress of grievances.

The second question divides itself into two subheads (1) the rendering of services of the Committee or of the members thereof without compensation in defense of American citizens who believe their constitutional rights to be imperilled by any legislation, and (2) the publication of a proffer of such service by radio broadcast, the distribution of pamphlets, or otherwise.

As to the first of these questions there would seem to be no doubt. The defense of indigent citizens, without compensation, is carried on throughout the country by lawyers representing legal aid societies, not only with the approval, but with the commendation of those acquainted with the work. Not infrequently services are rendered out of sympathy or for other philanthropic reasons, by individual lawyers who do not represent legal aid societies. There is nothing whatever in the Canons to prevent a lawyer from performing such an act, nor should there be. Such work is analagous to that of the surgeon who daily operates in the wards of the hospitals upon patients free of charge—a work which is one of the glories of the medical profession.

As to the second question, consideration must be given to the effect upon it of two of the Canons of Ethics of the American Bar Association: Canon 27 provides that there shall be no solicitation of business by newspaper advertising or touters or otherwise; Canon 28 provides that it is unethical to stir up litigation or strife. In the opinion of the Committee, this proffer of service, even when broadcast over the radio, or tendered through the circulation of printed matter to the general public, offends neither of these Canons. The Canon proscribing the solicitation of business is aimed at commercialization of the profession. It announces the principle that the practice of the law is a profession and not a trade, and that the effort to obtain clients by advertisement is beneath the dignity of the self respecting lawyer. It has to do, moreover, with the effort to obtain remunerative business,—the endeavor to increase the lawyer's practice with the end in view of enlarging his income. It certainly was never aimed at a situation such as this, in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed.

Nor is there any fair interpretation of Canon 28 which may be said to be offended by this proposal. It will be noted that the offer made in the address is to defend citizens against threatened infringement of their constitutional rights. So far as we are able to anticipate, no substantial increase of litigation is likely to result from the expressed willingness of these men to serve in such capacity. All that they have offered is their experience and skill "if and when any American citizen, however humble, is without means to defend his constitutional rights in a court of justice." The Committee is unable to see anything unethical or improper in such a course. Our view finds support in In re Ades 6 Fed. Supp. 467.

This opinion is written with full knowledge of the controversial questions involved; of the tremendous issues which are now before the American people and in which the American Liberty League and the National Lawyers Committee are vitally interested on one side. It is the opinion of the Committee that circumstances such as these render it wholesome and beneficial that there should be free interchange of views and public expression of opinion by those best versed in the topics concerned. This group has organized and appears on the one side; a similar group may well organize and function on the other side. Such an eventuality is more to be desired than feared. So long as the rights of the public are entrusted to those best able to serve them by reason of their skill, experience and high motive, the public will be well served. A nation is at its safest when its most eminent citizens are imbued with sufficient patriotism to interest themselves in the public welfare, even at great sacrifice to their private affairs.

Consideration of the public addresses, interviews and correspondence relating thereto, which have been submitted to this Committee, convinces us that the issue raised is one of conflicting theories and philosophies of government under the federal constitution.

The question presented, with its implications, involves problems of political, social and economic character that have long since assumed the proportions of national issues, on one side or the other of which multitudes of patriotic citizens have aligned themselves. These issues transcend the range of professional ethics.

School for Justice Officials Suggested

Attorney General Cummings recently returned from a tour of police and judicial agencies in England, France and Belgium. He reported that those countries had gone further toward solving their crime problems than America had, but added that their systems could not be transplanted bodily to this country.

The Attorney General also stated, in the course of an interview in the New York Times, that rules of procedure in Federal criminal cases, now being drafted, would cut the red tape which now allows undue delays in prosecution in those courts, but that improvement of State criminal procedure still remains to be undertaken. It was hoped to make the Federal system a model.

In this connection, he made the striking statement that a school for the training of Federal district attorneys, marshals and commissioners would be helpful in the United States, because many men come to these positions with little or no comprehension of the scope of the problem.

THE STATES AND THE LEGAL PROFESSION

Representative and Effective Organization of Legal Profession in Each State Is the First Step toward Improved Organization and Leadership of the American Bar — Increasing Consciousness of Bar Problems and Responsibilities in the States—Instances of Better Understanding and Definite Advance—The Organized Bar Must Remain Independent—Supervision of the Legal Profession a Function of Each State and Its Courts—Plans for a Representative National Organization, etc.*

By Hon. William L. Ransom
President of the American Bar Association

MR. PRESIDENT, Governor Ehringhaus, Members of the North Carolina State Bar: I count it a great privilege to come today to this progressive State and to be presented here by your distinguished Governor. I have not come to make a speech. I shall submit to you no observations, learned or otherwise, as to the state of the Nation, or the great problems in which many of us are interested. It has seemed to me that it might be appropriate to have a family talk about our profession and our Bar organizations, especially the legal profession in relation to the States and to what is taking place and is projected with respect to a better organization of the Bar.

I have come to you at the end of a long trip which has taken me through many States—to California for the second time in a few months, and into New England and many of the intermediate States of the Middle West and the Far West. What I would like first to mention is the fact that as I go around the country and talk with the lawyers who are in these Bar organizations in the States and the localities, I get an impression that very interesting things, and very encouraging things, are taking place and are about to take place, with respect to the legal profession in this country. North Carolina, of course, is one of the States which we have been watching, with interest and with approval. North Carolina, with its tradition of able and patriotic lawyers and its record of achievements in education, agriculture and industry, is notably one of the States in which American lawyers have reason to feel that there has been an outstanding step in the right direction, through the establishment of this integrated Bar as suited to your conditions of life and practice.

Whether a State shall or shall not adopt for itself the integrated type of Bar organization is, of course, wholly for decision within the State; and the American Bar Association is not urging upon any State the adoption of any particular type of Bar organization. The National organization of the lawyers, through the American Bar Association, will of necessity remain voluntary in type, with selective membership. But when I find that a State has adopted the inclusive type of organization for its lawyers, and starts out to make that organization an agency of advance and accomplishment in the interests of both the public and the profession, I cannot help feeling that such a step is forward. That is what you have done and are doing in North Carolina, and I add that what you have recently done, in respect to higher standards of legal education and admission to the Bar, has likewise caught the attention and won the commendation of your brethren in other States.

The Organized Bar Should Enlist the Young Lawyer and the Law School Student

I am especially honored and happy to see, in this meeting this morning, so many of the younger men, many of whom seem to me probably still in law school, and others in the Junior Bar or eligible for the National Junior Bar Conference. Some of you may have thought from the photograph which was resurrected this morning in your home paper, a likeness dating back about twenty-five years, that the American Bar Association has this year chosen its president from the Junior Bar. That has not yet come about, although it may be in the offing. In any event, I have long believed that one of the essential things for the real and lasting improvement of Bar organization is to correct the situation under which we have left the younger lawyers, and the candidates for the bar, entirely on their own, with no contact with Bar Association work and no comprehension of it, until they become really too busy and too interested in other things to take up the work of the organized Bar.

We should not be satisfied until, in every law school, there is a unit of Bar organization which is supervised by and affiliated with either the Bar organization of the Nation or that of the State, so that the young candidate to the bar will get his schooling in Bar organization along with his schooling in law and professional ethics, and will come out of that unit into the Junior Bar, and then into the State and local Bar Associations and the American Bar Association, to work as a senior, when he reaches thirty-six years of age. We need to enlist the activity and interest of the young lawyers from the start, as you are doing in North Carolina, in your law schools and in your State Bar organization here today.

Effective Organization of the Lawyers Within Each State Is Essential

Everywhere there is a renewed interest in bringing about an improved National organization

*Address delivered by Hon. William L. Ransom before the Annual Meeting of the North Carolina State Bar at Raleigh, Oct. 18, 1935.

of the lawyers. But we all will do well to realize, at the outset, that the first step toward improved organization and leadership of the American Bar needs to be a representative and effective organization of the legal profession within each State. However ambitious and adequate may be the plans for a better structure for the American Bar Association, their vitality and success in operation will of necessity come home to the States, and will rest with the Courts and the State and local Bar organizations, in each State.

There are lawyers who expect or hope for magic, to come from what is projected by way of better National organization of the profession. We may as well face that fervent hope frankly at the present juncture, lest some be disappointed. Upon its organization in 1878, the American Bar Association went far in the lead of the relatively few State and local Bar organizations then existing. For many years, the American Bar Association made the outstanding contributions to the future of the legal profession in America. In recent years, the American Bar Association has retained its leadership, but has fallen behind many of the State Bar organizations, and some of the local organizations, in structure and representative character of organization, as well as in some phases of practical and intensive activity in the interests of the average practicing lawyer and the public.

A National Organization of the Bar Cannot Be Better Than Its Constituent Elements

In proposing a representative structure for the National organization of lawyers, let no one be allured by an idea that a federation can rise above and far surpass its constituents. If pending plans are carried to fruition, the resultant organization will hardly be more robust, or more effective, than are the State and local Bar organizations whose chosen representatives it brings together and vests with policy-determining powers. The American Bar Association, under any practicable plan that can be devised, will be influential or relatively impotent, according to the adequacy and effectiveness of the State and local organizations of the Bar, and according to the extent of the active interest and participation of the rank and file of the membership.

Some of us are talking a great deal—perhaps too much—about changes in the by-laws and mechanics of Bar organization. We have been intent in bringing about a form of representative organization which will reflect the views and wishes of a numerical majority of the lawyers of the United States, and we have sought soundly to correlate existing organizations to that end. Perhaps this has seemed, to some of you, like over-emphasis on forms, procedure, and routines, of organization. Perhaps it is. In any event, unless there were definite signs that something more is on the way, changes in structure of organization would hardly be worth while.

The Active Personal Interest of 75,000 to 100,000 Lawyers Is Required

No one should be misled as to what it is all about, or as to the necessary objectives. Unless at least 75,000 to 100,000 lawyers can be interested, and kept interested, actively in the work of the organized Bar, the most promising plans for better organization are not likely to be of great avail. The required support is individual, not merely collective. Seventy-five to one hundred thousand lawyers, individually interested in the future of the profession and actively taking part in their State and local organizations, are necessary for the success of plans for a representative organization of the lawyers of the land.

During the next ten months, we need to find out how many lawyers are content with things as they are, and how many are willing really to do something for their betterment. I find many signs of an awakening interest, on the part of the average practicing lawyers, in the smaller cities and the towns; and the extent of that manifestation of interest will be, for me, the practical test. If it does not take form as a definite, militant interest, it is idle to talk about taking now the forward step which is at hand.

Increasing Consciousness of Bar Problems and Responsibility.

The thing which has impressed me, in what is taking place in the various States with respect to Bar organization, I may indicate to you in this way, without suggesting that the trend has yet reached anything like definite or final form, although it has manifested itself definitely in some States and localities: The transition may perhaps be summed up, in rather general terms, as an increasing realization of the responsibility of each the Courts and the organized lawyers, for the profession of the law in its relations and duties to the public. Judges and lawyers alike are moving on towards a realization that there is a responsibility—for the ethics of the profession, the conduct of the profession, and the organization of the profession—which neither the Courts nor the Bar Associations can, or should try to, evade or avoid. And we see multiplying signs of realization that if this dual responsibility is not fulfilled, the public holds the Courts as blameable and the public holds the Bar Associations and the lawyers as blameable.

Instances of Better Understanding and Definite Advance.

Out of the many specifications that could be cited, may I bring to your mind a few? Today every State on the Pacific coast, and every State on the Pacific slope, has an integrated Bar. The American Judicature Society currently publishes a map of the Bar integration movement in this country. In the current issue, the map shows the picture, as between the seventeen States that have already adopted an integrated Bar, the many States in which the State Bar Associations have come out for and are urging and about to accomplish an integrated Bar, and the States in which so far there has been inaction or nothing decisive. West of the Mississippi River there is only one State in black, which means one State in which an integrated Bar, under legislative sanction or by rule of Court, is not either in effect or well under way. The States that are left in black are almost wholly in the Northeastern section of this country.

It was a most impressive meeting which I attended, the other day, of the State Bar organization in California. That State Bar now has thirteen thousand members, which is about two and one-half times as many as we have in the New

York State Bar Association, although New York has about twice as many lawyers as California. The other day, when I saw the members of the Board of Governors of the State Bar of California, who had been elected by the members of that State bar by mail ballots in their respective judicial circuits, stand up before that great convention and be sworn in with the public officers' oath by the Chief Justice of the Supreme Court of the State, it seemed clear to me that something important and significant is taking place in Bar organization in at least the western part of the country—something which we do not see from the tallest towers of office buildings in the metropolitan centers of the Northeast.

Another of the most interesting developments at this moment is in the State of Missouri, where the highest Court of law in the State, in the exercise of its inherent judicial power, has not only integrated the Bar for various public purposes by rule of the Court, has not only appointed a committee in behalf of the Court to take charge of disciplinary measures in the State, but has defined the legal profession in a way which is of benefit to the profession and also a protection to the public. The definition which is now a rule of Court in Missouri, and is being enforced by the process of the highest Court of the State—its famous rule 35—is that "the professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibility and qualifications are individual. He should avoid all relations which direct performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal and the responsibility should be direct to his client."

We should note that this definition is not something which a Bar Association is agitating for; it is not something which a committee of a Bar Association is solemnly recommending and writing reports about; it is something to which, in the exercise of its inherent responsibility for the profession and its organization, its control over the lawyers who are its officers and its creatures, the highest Court of law in a great State has given the force of law and the vitality of the judicial power, back of its enforcement.

I might go on to mention other States and depict what is taking place. Your good neighbor, the State of Kentucky has adopted an integrated Bar; and it was interesting, the other day, to learn that some of the members of the profession including some of the active practitioners in the City of Louisville, which has a Bar of about eight hundred lawyers, had apparently been remiss in living up to their obligations and paying their dues, as members of the integrated Bar organization of the State. An Order was entered by the Court, upon it own motion, which struck from the rolls of the practicing lawyers of the State eligible to appear in the Court, the name of every lawyer who was delinquent in that duty to his State Bar organization.

In several of the States, the lawyers, through their organizations, are coming to realize that the Bar Associations can and should render an increased service to the lawyers in their professional work. I am speaking now, perhaps more of local Bar Associations than of the State Bar Associations, although in some States the State organizations are alert in this matter, as in Illinois and Ohio. In one county of my own State, in which is located the City of Syracuse with a relatively large Bar, the local Bar Association took up the idea that it ought to do something for the lawyers that would be really helpful to them in their practice. The Association started getting out a news letter, monthly or oftener, with reports of the decisions, administrative rules of the State departments, enactments of the legislative bodies, etc., information on bills pending, etc. That local Bar Association, when it started out on this practical step a short time ago, had a membership of about twenty-five per cent of the total number of lawyers in its locality. Today this local Bar Association has a membership of more than ninety per cent of its Bar; and among lawyers outside of its locality, it has many subscribers, who pay $2.00 a year for this service letter, because their own local Bar Association is not yet doing any such useful thing.

Imposing Building which is the Center of the Judiciary of North Carolina and Houses the Supreme Court of the State.

I might cite many other instances of aroused and effective work and interest on the part of local and State Bar Associations—Indiana, with its successful fight against an anachronism in its State Constitution and for fitting standards of legal education and admission to the Bar; Ohio, with its advance in standards and its interesting exploration of ways and means of raising the quality of its part-time law schools; Utah, with its effective discipline under Bar integration and its useful committee on public relations; Illinois, with its many useful services to the practicing lawyer; Philadelphia, with its dramatic and effective purging of the undesirable from the Bar, under the leadership of the present Chairman of the American Bar Association's Committee on Professional Ethics and Grievances. The enumeration could be extended, with equally significant instances; it is almost unfair, for me to mention so few, and to omit reference to so many, developments that reflect a hopeful trend.

Tasks of Representative Organization Immediately Ahead

Much that is taking place is truly a cause for encouragement. On the other hand, we must

frankly recognize that in a few States the legal profession is still poorly organized and generally indifferent to its responsibilities, and that in not a few States the Bar organization is relatively inactive on a year-round basis, has a small percentage of its lawyers in the American Bar Association, and appears to be practically content with this palpable inadequacy.

Some lawyers who today are insistent and eager for a representative and improved National organization of the Bar appear content with inadequate and unrepresentative organizations of the profession in their own States. They do not explain by what alchemy or magic a representative National organization can be builded from State and local units that are relatively small, unrepresentative and inactive.

Sixteen States have less than fifteen per cent of their lawyers in the American Bar Association. North Carolina has only twelve per cent of its lawyers in the American Bar Association. Twenty-two States have less than one-fourth of their State Bar organization members in the American Bar Association.* Some twenty-three States have less than half of their lawyers in their State Bar organization. Thirteen States have less than three-fourths of their American Bar Association members enrolled in their State Bar organizations. These conditions are hardly solid foundations on which to build a representative National organization of the Bar.

On the other hand, in seventeen States every lawyer is automatically a member of its State Bar organization, a participant in its affairs, and subject to its disciplinary measures. The list of such inclusive Bars is growing rapidly. Of the 175,000 lawyers in the United States, about 78,000, or about 45 per cent, are members of their State Bar organizations; and 110,000 to 115,000, or upwards of 60 per cent of the profession, are members of some Bar organization, State or local. About 38,000 lawyers are members of the State Bar organizations in the seventeen integrated Bar States, and about 40,000 lawyers are members of the State Bar Associations in other States. Yet the American Bar Association has only 27,500 members in all, which is a large number, on a selective basis, and calls for improvement in a form of organization erected for a smaller and less representative membership.

The Need for Effective State and Local Bar Associations

During the past fifteen years, I have been privileged, in several capacities, to see a good deal of the work and functioning of the American Bar Association, and to form definite opinions as to its worth and practicalities. Of the need for National leadership, Nation-wide standards, and a National consensus of opinion and concert of action, on many matters affecting the legal profession, there can be no fair doubt.

I am not one of those who believe that, upon the issues which so sharply divide the lawyers as citizens, any organization of the Bar can, or should try to, speak or act for the profession as a whole. On various matters directly affecting the profession, the law, and the administration of justice, a consensus of opinion develops within the profession; and as to such subjects, the means should be provided for ascertaining that opinion and making it effective without trying to subject the individual lawyer to any remote authority or control.

The Organized Profession Must Remain Independent

The Bar Associations and Bar organizations of the States and the United States should be kept free of political intimidation on one hand and political control on the other. There are many activities and functions as to the legal profession which, necessarily or preferably, belong to the profession as organized within the States, acting in cooperation with the State Courts. The lawyers of each State are the officers of its courts, which determine their educational and ethical qualifications and

*The picture as to American Bar Association membership, in relation to the total number of lawyers, and the relative ranking of the States in these respects, may be of interest. It is given as of June 30, 1935, although a few States have, by active membership efforts, greatly changed their relative rankings. It will be interesting to see what will be the ratios and rankings, as of the early months of 1936 and as of June 30, 1936. The percentage ratios, by States, of the number of American Bar Association members to the total number of lawyers in the State, as of June 30, 1935, have been indicated to be approximately as follows:

State	*Total Number of Lawyers*	*Members of A. B. A. June 30, 1935*	*Percentage of A.B.A. members to lawyers in State*
Delaware	207	94	45
Nevada	305	120	39
District of Columbia	3,477	1,136	33
New Hampshire	363	105	29
Wisconsin	2,600	719	28
Connecticut	1,886	496	26
Vermont	331	84	25
New Mexico	360	83	23
Rhode Island	675	152	23
Colorado	1,563	346	22
Florida	2,615	545	21
Louisiana	1,856	389	21
Maine	763	158	21
Utah	757	162	21
Wyoming	300	60	20
Arizona	698	143	20
Illinois	11,770	2,344	20
Minnesota	3,145	604	19
Pennsylvania	8,093	1,543	19
Iowa	2,634	502	19
West Virginia	1,554	289	19
Idaho	551	97	18
Washington	2,335	399	17
Massachusetts	6,940	1,189	17
Nebraska	1,751	299	17
Missouri	5,560	936	17
South Carolina	1,135	190	17
South Dakota	727	125	17
California	13,000	2,072	16
Maryland	2,782	437	16
Virginia	2,419	376	16
Kansas	1,832	270	15
Michigan	4,908	732	15
New York	27,593	3,814	14
Mississippi	1,350	170	13
Indiana	3,818	513	13
Montana	714	94	13
New Jersey	6,633	870	13
Oklahoma	3,750	481	13
Ohio	8,886	1,129	13
Oregon	1,736	200	12
Tennessee	2,484	306	12
North Carolina	2,300	285	12
Texas	6,591	799	12
Arkansas	1,512	179	12
Alabama	1,740	205	11
Georgia	2,813	311	11
North Dakota	675	65	10
Kentucky	2,750	295	10

training, admit them to practice, and have inherent responsibility for their conduct and discipline. The matters are functions of the State Courts and of the State and local organizations of the profession. The lawyers of each State are an essential part of the American system of administering impartial justice under law. A legal profession subject to political control or coercion would be as repugnant to the spirit of our institutions as a judiciary supine and politically controlled, and such control or coercion of the profession, if attempted, would in fact be an invasion of the province of the Courts as to their officers.

An independent and outspoken Bar, which in its championship of genuine public interests is neither subject to political intimidation nor subservient to the contentions of clients, is the staunchest safeguard of a free people. Individually and as citizens and as counsellors, lawyers think and act as they individually decide; but the organized Bar should be self-governing as to its leadership and policies, and represent faithfully the consensus of opinion of its own membership. It cannot be made the spokesman or agent of any political party, organization, group or interest, and should voice resolutely the mature and independent judgment of the whole profession, regardless of whether that collective judgment runs counter to the plans or wishes of any political group or politically-minded leadership. Lawyers are traditionally individualists; their service to clients is personal; each lawyer is most closely identified with its own community, its institutions, its industries, and the problems of its people; he is instinctively opposed to arbitrary power and remote authority over matters of essentially local concern. A primary task in improving the organization of the legal profession is to keep its work and its policies under the control of its members and avoid any grounds for a feeling that the organized Bar is something aloof and under remote control.

It may best be assured and understood that the collective opinion of the legal profession upon public questions, when deliberately ascertained, cannot be commanded by retainers, cannot be cajoled by office or favors, cannot be coerced or made afraid through political attacks upon individuals or the whole profession, and cannot be made to bow to a political domination of the effective new forms of Bar organization. When the welfare and future of America are under public discussion, our country gravely needs the disinterested counsel of a profession that cannot be bullied, bought, silenced, or made subservient to any political purpose. If challenge is anywhere to be made of these enduring principles, the issue may best be faced squarely and now.

It is my personal belief that the lawyers of America, irrespective of geography and affiliations, are instinctively opposed to arbitrary and centralized power, wherever and in whatever form it makes its appearance. In the discussion of great National issues that are immediately ahead, the lawyers of this country should set an example for tolerance, breadth of outlook, recognition of the other fellow's point of view, and patriotic adherence to the American tradition of liberty under law.

Is the American Bar Association "Just Another Bar Association"?

If the American Bar Association is "just another Bar Association", National in its scope, and not the National agency of the State Bar organizations through their chosen delegates, then the volume of work and the centralization of functions, imposed on the American Bar Association, become extensive and costly. In considerable part, they duplicate or overlap the work and functions of the State Bar organizations.

In what I am saying here today, I am not criticising either the past or the present of the American Bar Association. I am proud of its past and its present, and mightily interested in its future. The Association has an honorable record of achievement, from the time of its founding in 1878. It has done and is doing a great number and variety of useful and absolutely indispensable things for the legal profession. I mention one: I would like to have you try to picture to yourself what would have been the plight of the legal profession, in this State and in this country, during the recent depression, when so many young men turned aside from manual pursuits and tried to be admitted to a great profession for which they never could have been fully qualified—what would have been the plight of the lawyers in many States, if there had not been American Bar Association standards of fitness and of requirements for admission to the bar, which protected the public and the profession from this threatened invasion which would have had such serious consequences? In the next issue of the AMERICAN BAR ASSOCIATION JOURNAL,[1] I have undertaken to review and summarize the useful and constructive things which the American Bar Association has done and is doing for the legal profession.

But with respect to the American Bar Association, what are the conditions with which we are faced and which we are trying to improve? What are the defects or deficiencies? In the first place, we have the situation existing that the American Bar Association, in what it undertakes to say or do, is labeled as speaking for a minority and not a majority of the lawyers of the country. There is lacking the means of finding out what the great majority, the rank and file of the practicing lawyers, really want. In the second place, there is a defect in that the control of the organization may at any time be or become rather casual in its character. It depends a great deal upon those who attend the conventions, which means two to three thousand lawyers, out of the great body of lawyers in the country. In the third place, and more fundamentally, the present structure of the American Bar organization does not bring in and does not utilize the fine things that have taken place, since the formation of the American Bar Association, through the organization and development of these great State and local Bar organizations, which have become the outstanding feature of our Bar organization. Into the meetings of the American Bar Association, there may come, and do come, men who represent and would be entitled to speak for hundreds or thousands of lawyers in their own States. They are the officers or delegates of great State Bar Associations or great local Bar Asso-

1. November (1935) issue.

ciations. Nevertheless that delegate and representative capacity is not recognized or given force; and a lawyer who by his representative capacity would be entitled to speak in the National Council in behalf of hundreds or thousands of lawyers, may be outvoted by one or two men who happen to have the railroad fare and inclination to attend, and yet who represent nothing except what they have under their own hats.

A Representative Organization of a Majority of Lawyers

What is the membership picture with respect to the National organization of the Bar? As I have said, the American Bar Association was formed in 1878 with relatively few members; and probably it was not in the minds of the founders of the Association that it would ever have many members. At that time, there were only a few State Bar Associations and no great number of local Bar Associations; and those that were in existence were not strong. Now the picture is that we have in the American Bar Association, not three hundred members as in 1878, or five thousand members as there was early in the century, or ten thousand members as there was twenty-five years ago, but twenty-seven thousand five hundred members. However, that is only twenty-seven thousand five hundred members out of about one hundred and seventy-five thousand lawyers in this country; and in many of the States, the representation of the legal profession in the American Bar Association is not large. To be perfectly frank about it, it is not large in North Carolina. Some of the States have about one-half of their lawyers in the American Bar Association. In North Carolina, as I have told you, you have about twelve per cent. That is true as to about a dozen other States. The problem is: How are you going to make a major organization that really represents the legal profession in this country, out of twenty-seven thousand five hundred lawyers, when the legal profession is made up of one hundred and seventy-five thousand lawyers?

The State Bar organizations of this country have about seventy-eight thousand members. Probably within a year or two, through the growth of the integrated Bar organizations, they will include soon more than half of the lawyers of this country. In the State and local Bar organizations, there are today about one hundred and ten thousand lawyers, which is considerably more than half of the active practicing lawyers comprised within the one hundred and seventy-five thousand. There is plainly a way of putting together a majority organization, but the problem is not entirely of membership.

What is planned, in the proposals now pending? In the first place, it is proposed, through and in the American Bar Association, to create as its governing and controlling body a representative House of Delegates, composed of representatives of the State Bar organizations and probably also of the stronger and more active local Bar Associations, instead of leaving the control and power and policies and leadership of the Association to those who chance to attend conventions in their individual capacities. It is proposed to put the control in the hands of a National House of Delegates of the legal profession, in which these State Bar organizations will have the control and the power of decision to which they are entitled.

In the second place, it is proposed to establish a better system for the nomination and election of those who hold the official positions in the American Bar Association. At the present time the nominating body, and in many respects the active political body of the Association, is known as the General Council. Today a member of the General Council is chosen by whatever lawyers happen to come to the convention from the particular States —and the number from some States may be very few, while from other States it may be very large. There is not an opportunity for the rank and file of the members of the American Bar Association in the States, who naturally cannot go to the conventions or do not go—there is no opportunity at the present time for them to participate in the choice of their State delegates in the General Council or in the choice of officers. Some system will probably be adopted and put in force, under which the member of the General Council, or whatever body it is called, representing the members of the American Bar Association in a State, will be chosen directly by the members of the American Bar Association, through mail ballots, instead of leaving it to the accident of those who happen to come to the conventions.

Supervision of the Legal Profession Is a Function of Each State and Its Courts

The impression has unfortunately existed, almost from its founding, that the American Bar Association is remote and aloof from the average practicing lawyer, and unresponsive to his needs and wishes. To a considerable extent, this feeling has been due to the absence of a representative structure that subjects the Association and its policies directly to the control of its members and the organized profession in the States. The grounds for the impression will be considerably removed, when a representative structure and control of the Association has been established. My personal belief, however, is that this impression has a more deep-seated and fundamental basis.

If the American Bar Association is to be truly representative of the profession, some decentralization of functions is necessary, along with a representative control. The legal profession and its organization are best kept close to the Courts and the public policy of the States whom they serve. Many functions are better performed, if kept in the hands of those who know the local conditions, needs, and points of view.

The American Bar Association should not become a bureaucratic supervisor of the legal profession. It will fail and fall of its own weight if that were made its program. It will succeed and prove increasingly useful if an intelligent demarcation of its functions from those of the State and local Bar organizations is made and enforced. Centralization and aloofness from the people is as undesirable in the organization of the legal profession as it is in the functions of government.

In various ways which I cannot detain you by discussing now, it will be possible to secure a larger interest, membership, attendance, and participation in the work of the American Bar Association; but, fundamentally, there is every probability that

through the action of its next annual convention, the State Bar organizations of the country, the forty-eight of them, will be put in charge of the American Bar Association, through a House of Delegates in which they are each represented.

The "Time Schedule" for the Consideration of Plans

What is being done to these ends, and what is the time schedule? Within a short time, a definite plan will be before the lawyers of the country. The various Committees which are drafting a plan for consideration will meet in Chicago next week. Messrs. John W. Davis, Newton D. Baker, and other active practicing lawyers, are on those Committees. The plan will be submitted for a period of consideration and of discussion. At that time, we hope very much to hear from the State and local Bar organizations throughout the country.

Many of those Associations have already created and empowered committees to consider the co-ordination plans and make such suggestions as may be desirable from the viewpoint of their States. In January, after these suggestions have come in and have been considered, the plan will be put in definite form for action. In April or May, there may be a meeting of delegates from the various Associations. In any event, at the Boston convention of the American Bar Association, the matter will come to the stage of final action; and that convention, I may say, will open in Boston on the 24th day of August, 1936. If you are interested in the future of the legal profession and in the plans which are being made for its better organization and functioning, you should decide now and plan to come to the Boston convention, and be present at its opening day.

The plan that will be submitted will not represent the ideas of any one man or any few men or any group. I am frank to say that it will not represent my ideas, in details that seem to me important. It will, however, be the consensus of the opinion of many lawyers of high ideals and practical experience. In Los Angeles, we were given a mandate to develop promptly a definite and practicable plan. That has been done. The rest is with you. If you do not want the plan that has been prepared, it will be easy for you to say so. The plan is available; I do not expect to devote time to urging or pleading for it. If you want it, adopt it. My pledge of the Los Angeles Convention will soon be fulfilled. There will be a full opportunity for any member of the American Bar Association or of any State or local Bar Association, to offer suggestions, which will be carefully considered, for its improvement.

But I suggest this point of view for consideration: That although the plan, when it is brought forward, will have some details with which neither I nor many of you will agree, the decisive question will be whether, after everyone concerned with this matter has done his best and has put the plan in the best form of which the Committees are capable, the result is a plan which is a substantial improvement on the existing structure of organization. If it is, then it seems reasonable to hope and expect that it will have your cordial support. There will be no magic in the plan. You cannot create a better organization of the lawyers of this country, by writing a system into the Constitution and By-laws of a voluntary association. The plan will necessarily depend upon the cooperation of the strong and active local Associations and the strong and active State Associations.

There will be nothing brought forward to destroy or disturb the independence and solidarity of the State and local Bar Associations. The National organization cannot, and should not attempt to, come into the States, to dictate or supervise the policies of the organized profession or the views of the individual lawyers of the States. In the very nature of things, those concerns are best left close to the people. The plan will preserve completely the autonomy and the solidarity of the State and local Bar organizations; but it will try to bring together, through this representative House of Delegates, the best there is in the State and local Bar Associations, and will let these Bar organizations—not merely the casually attending lawyers—control and decide the policies of the organized Bar of the Nation.

The Public Usefulness of State and Local Bar Associations

Well-organized, independent and active State and local Bar Associations can be an enlightened and effective factor in preserving the integrity of State and local governments throughout the United States. To my mind, the improvement of State government and of local self-government is a paramount duty and responsibility of lawyers, individually and collectively. The President of the United States has wisely pointed out this public duty; and the American Bar Association, through its new Section of Municipal Law, is actively studying the situation, with a view to making recommendations to State and local Bar organizations.

Vigorous, economical and efficient State and local governments, adapted to local conditions and responsive to the public needs, should be defended and aided as a primary safeguard of liberty and of whatever is distinctive in American life and institutions. As Thomas Jefferson wrote in 1811 to M. DeTracy:

> "The true barriers of our liberty in this country are our State governments: and the wisest conservative power ever contrived by man, is that of which our revolution and present Government found us possessed . . . Distinct States, amalgamated into one as to their foreign concerns, but single and independent as to their internal administration, regularly organized with a Legislature and Governor resting on the choice of the people, and enlightened by a free press, can never be so fascinated by the arts of one man, as to submit voluntarily to his usurpation. Nor can they be constrained to it by any force he can possess."

In Conclusion

In closing, may I say that in taking up these tasks of the better organization of the Bar at this time, we have started anew, about where the great leaders of the Bar of this country were starting, some twenty-one years ago. At that time, the leaders and members of the Bar of the Nation were on the way to accomplish some of the things about which we are now in action. Then came the World War, and the ambitious plans had to be laid aside. Next came the post-war problems, still more cruel and unfavorable for doing anything about these matters.

Now we are taking them up again, at least

(*Continued on page* 822)

THE FEDERAL SOCIAL SECURITY ACT

The Act Is a Miscellaneous Group of Enactments Relating to a Permanent Policy of Federal Concern for Victims of Economic and Physical Disaster—The Grant-in-Aid Program—Application and General Administrative Setup—Constitutional Basis for Taxes Levied by Act—Arguments for and against Constitutionality of Unemployment Tax Provisions—Constitutional Provisions Involved in Annuity Program—Old Age Annuities and Unemployment Insurance, Etc.

By Barbara Nachtrieb Armstrong
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THE Federal Social Security Act is an omnibus measure comprising a miscellaneous group of enactments arranged under eleven "Titles." These enactments have one and only one common quality. They all have some relation to a permanent policy of federal concern for victims of economic and physical disaster. Most of the sections evidence an assumption of federal responsibility, which never before has been accepted on other than an "emergency" basis.

The eleven Titles, listed in the order in which they appear in the act, are:

Title I. Grants to States for Old Age Assistance.

Title II. Federal Old Age Benefits.

Title III. Grants to States for Unemployment Compensation Administration.

Title IV. Grants to States for Aid to Dependent Children.

Title V. Grants to States for Maternal and Child Welfare.

Title VI. Grants to States for Public Health Work.

Title VII. Social Security Board.

Title VIII. Taxes with Respect to Employment.

Title IX. Tax on Employers of Eight or More.

Title X. Grants to States for Aid to the Blind.

Title XI. General Provisions.

In discussing their subject matter, the sequence of the titles in the act will be disregarded. Six of the titles form a natural group, Titles I, III, IV, V, VI, X. In all of these, Congress makes use of the familiar legislative device of federal grants-in-aid to the states for promotion of selected state activities. Moreover, these state activities with one exception[1] concern conventional governmental functions.

Of the remaining five titles, Titles VII and XI are alike in that they relate to the general application and administration of the act. Titles VIII and IX are alike in their imposition of new federal taxes. Title II is unique among the titles in that it puts the spending power of Congress to a new use. Titles IX and II have a common approach to the problem of economic dependency; namely, that of "insuring" or "securing" workers against destitution due to interruption of earnings. This approach, while a commonplace abroad, has not been a conventional subject of legislation in this country except in the field of Workmen's Compensation.[2]

Obviously, it is the last mentioned titles of the Social Security Act (Titles II, VIII and IX) which, by reason of their novelty, and of their possible constitutional complications, merit major attention in a general survey article.

In the following discussion, therefore, there will be a brief exposition of the sections spoken of as forming a natural group, i.e., the "Grant-in-Aid" titles, an explanation of the set-up of the Social Security Board and an analysis of the Titles directed at less familiar objectives. The latter will include an exposition of the legislative devices by which these objectives are sought to be achieved and a consideration of the arguments which can be made both on behalf of and in opposition to the constitutional propriety of these devices.

In conclusion there will be an appraisal of the program embodied in the act considered as a whole.

THE GRANT-IN-AID PROGRAM

There are eight kinds of new grants-in-aid provided in the Social Security Act as well as an additional appropriation for vocational rehabilitation.[3] In five instances grants are conditioned upon stipulated "matching" expenditure by the states under plans which meet stated requirements and have been formally approved by a designated federal agency. These five include grants-in-aid of state expenditures for the promotion of maternal and child health (Title V)[4] and of state assistance to four types of needy individuals, to wit: aged persons (Title II), blind persons (Title X), dependent children (Title IV), and physically handicapped children (Title V). In two cases, that of grants-in-aid of public health services (Title VI) and in aid of child welfare services in rural areas (Title V), no conditions are attached to the federal grants except that the funds be expended by the states for the general purposes for which the grants are made. The eighth grant is designed to finance the entire cost of administration of unem-

1. The "one exception" referred to is the grant for administration of unemployment insurance, in Title III.

2. Wisconsin is a conspicuous exception in that she enacted an Unemployment Reserves Act. See Stat. of Wisconsin, Special Session 1932, Chapter 20.

3. A regular annual appropriation is made under the Federal Rehabilitation Act passed in 1918 and administered by the Office of Education in the Department of the Interior.

4. Similar to that set up by the Shepherd Towner Act in 1921, 42 Stat. at Large 224, and discontinued in 1929, 44 Stat. at Large 1024.

ployment compensation in states which have "approved" plans. (Title III).

Disregarding the last mentioned grant, which is for purely administrative ends, much the largest expenditures are contemplated in the field of old age assistance and the amount appropriated for this grant is more than the total of the appropriations for all the other grants-in-aid. States that meet specified conditions will be given half of their total disbursements for their needy aged (other than those maintained in public institutions) with the limitation that in computing the federal share, anything paid by the state to any one person in excess of $30 in one month will not be counted.[5]

The actual amount of assistance to be paid by the various states is left to their own discretion. The chief conditions which must be met for federal approval of a state old age assistance plan are:

1. Financial participation by the state.
2. Establishment of a state supervisory administrative authority.
3. Right of appeal of applicants for assistance to this state authority.
4. An administrative plan which is deemed satisfactory by the federal administrator.
5. The granting of assistance at least to all persons of qualifying age (seventy years until 1940, sixty-five years thereafter) who are citizens that have resided in the state for five years or more within the nine years immediately preceding application and are without reasonable subsistence income.

The failure to include in these conditions a specific monetary amount for the minimum state old age assistance allowable is an acknowledgment of the great regional variations in cost and standard of living in the United States.

Approximately the same conditions as those required for the old age assistance grant must be met by the states in qualifying for the federal grants-in-aid for assistance to the blind and to dependent children.[6] The grant for the dependent blind is like that awarded for the dependent aged, i.e. fifty per cent of the state expenditures, but in the case of assistance to dependent children, the federal offer is only one-third (instead of one-half) of the amount spent by the state. The grants for aid to crippled children and to maternal and child health services are stated in terms of definite money amounts to be divided among the states with the requirement that the states make specified appropriations from their own treasuries.

This program of federal aid to the states conditioned upon state expenditures, obviously involves no federal guarantee of aid to needy or handicapped individuals. Some states may make no provision, and, unless the individual state is willing to bear its part of the burden, no federal contribution will be payable. Experience indicates, however, that the federal offer to match state expenditures does stimulate state action, and it may be anticipated that increased provision will be made for these dependent groups as a result of the federal offer to share the cost with the states.

The grants for the promotion of general public health services and child welfare agencies in rural areas (stated in terms of specific monetary amounts), as remarked previously, are not conditioned upon any state appropriations for the specified services.

In the case of the grants-in-aid of assistance to the aged and the blind and to dependent children, and of the grant for administration of unemployment compensation schemes, the federal agency from which approval of state plans must be elicited, is the Social Security Board. The Children's Bureau in the Department of Labor is given administrative control of the grants for maternal and child health, for crippled children, and for child welfare. The Public Health Service is directed to administer the grant-in-aid of general public health services (Title VI).

The foregoing grant-in-aid enactments present no constitutional problem other than that involved in the cases of Massachusetts v. Mellon[7] and Frothingham v. Mellon.[8] Both cases were petitions for the enjoining of the enforcement of the Sheppard-Towner Maternity Act. This Act, for the avowed purpose of cooperating with the states to reduce maternal and infant mortality and to protect the health of mothers and infants, provided appropriations to be apportioned among such of the several states as should accept and comply with its provisions.[9]

In refusing to entertain the suits, the Supreme Court held that neither a state nor a taxpayer had sufficient interest in the federal moneys to provide standing to ask for a judicial review of the constitutional propriety of a mere appropriation statute. The court pointed out that the judicial power of the United States does not extend to the reviewing of Congressional statutes except at the solicitation of parties whose rights are invaded by such statutes.[10] The state, which had complained that the United States was intruding into a field of purely local concern and, therefore, reserved to the states, was held to have suffered no violation of right. This holding was rested upon the argument that no obligation was imposed upon the state to accept the federal offer; without acceptance, the federal act would be ineffective in the state. The state's second contention, to wit, that it was entitled, in the role of *parens patriae*, to bring suit on behalf of its citizens, was rejected on the ground that as to relations between the citizen and the federal government, the latter, not the state, represented the citizens as *parens patriae*.

The citizen petitioner was held as taxpayer to have too minute and indeterminable an interest in

5. This, of course, means that the federal grant will not exceed $15 a month toward assistance to any one aged dependent, even if the state actually expends $40 or $50. Certain of the aged dependents in New York City, for example, receive between $40 and $50 per month as old age assistance.

6. In the case of dependent children the state may not refuse aid if there has been a year's residence (sec. 402) in contrast to the "five years out of the preceding nine" requirement permitted in assistance plan for the aged and blind.

7. 262 U. S. 447.

8. 262 U. S. 447. Indeed one of the Security Act grants, (i.e., for Maternity and Child Health, Title V), is practically identical with the federal enactment challenged in these cases.

9. 42 Stat. at Large 224, enacted in 1921, made ineffectual after June 30, 1929, by 44 Stat. at Large 1024 (1927).

10. Massachusetts v. Mellon, cited supra note 7 at pp. 488, 489.

the moneys of the Federal Treasury, to give a substantial right to challenge the use of such moneys.

APPLICATION AND GENERAL ADMINISTRATIVE SET UP

Titles VII and XI create the Social Security Board as an independent Board; authorize the making of appropriate rules by this Board and by the Secretary of Labor and the Secretary of the Treasury; extend the application of the act to Alaska, Hawaii and the District of Columbia as well as to the states; and provide the usual separability clause for the preservation of all remaining sections in the event of the invalidating by the court of any part of the Act.

The three members of the Board are direct appointees of the President (with advice and consent of the Senate) and have rotating terms of six years.[11] The Board is specifically authorized to "study and recommend" appropriate legislative extensions into the social insurance field as well as to perform its administrative duties.

OLD AGE ANNUITIES AND UNEMPLOYMENT INSURANCE

In Titles II, VIII and IX a wholly new type of provision is in contemplation, "contributory" retirement old age annuities and unemployment insurance.

The old age annuities are in supplement to the previously discussed grant-in-aid to old age assistance plans. The latter is directed primarily at the immediate situation of those who already are superannuated or shortly will be and who have not sufficient accumulations for self-maintenance in their old age. The annuity program, in contrast, is intended for employed workers of younger age groups. It will enable them to build up their right to assured income in their retirement period.

Old Age Retirement Annuity Program

The annuities will be paid from a special "Old Age Account" in the United States Treasury, to which annual appropriations are authorized sufficient, according to actuarial computations, to meet the obligations entailed by the annuities promised. It is contemplated that the amount of annuity shall vary both with the wage earned by the worker and the number of years he is employed.[12]

The table below illustrates the amount payable after a stated number of years of employment at a stated wage.

Illustrative Annuity Amounts
(Under Title II)

Average Monthly Salary	Years of Employment 10	20	30	40
$ 50	$17.50	$22.50	$27.50	$32.50
100	22.50	32.50	42.50	51.25
150	27.50	42.50	53.75	61.25
200	32.50	51.25	61.25	71.25
250	37.50	56.25	68.75	81.25

Minimum monthly benefit, $10; maximum, $85

The wage earner may retire and draw his annuity at sixty-five years of age. Employment after the age of sixty-five is discouraged moreover by the proviso that he forfeits a month's fraction of his annuity for each month *in any part of which* he is regularly employed. In addition to the annuity feature, there is guaranteed a payment to the estate of the worker who dies before retirement age (or shortly thereafter), the payment being roughly equivalent to the amount he has paid in special tax with three percent interest.

This annuity program approximates a contributory accumulation or insurance plan with an equal division of the burden of cost between the workers themselves and their employers. This "approximation" lies in the fact that special taxes are imposed (in Title VIII) upon the wages of employed workers and the payrolls of their employers, calculated to bring into the treasury an amount equal to that which will be needed[13] for the annual appropriations to the Old Age Account. Both taxes will be collected from the employer who is authorized to collect half of the amount from his employees as their share of the tax. Taxes will be imposed upon payroll and wages earned after December 31, 1936. The initial rate of both the employer's tax and the worker's tax is one percent. To this rate will be added an additional one-half percent every three years until the maximum of six percent total combined tax is reached in 1949 (i.e. three percent on employee, three percent on employer). In computing the tax on both payrolls and wages, wages paid in excess of $3,000 in any calendar year are not counted.

This is purely a *federal*, rather than a *state-federal*, venture, as indeed such a scheme would have to be in order to possess any actuarial foundation. This is due to the fact that prediction of the distribution of age groups is essential to the computing of contribution rates in relation to annuities. Such prediction, while roughly determinable for the nation as a whole, is impossible for individual states because of the unpredictable changes which take place in their age groups pursuant to the shifting of centers of economic activity. The younger "employable" age groups are, of course, drained out of the geographical districts in which the industries are declining into the states in which new industrial developments are taking place.

Excepted from the annuity scheme are (1) by reason of the administrative difficulty of collecting the special taxes from them: agricultural labor, domestic service in a private home and casual labor; (2) because of already existing special provision: maritime employments and employees of the federal government; (3) because of constitutional limitations on the taxing of states or their subdivisions: employees of a state or its political subdivision; and (4) for no reason except an effective lobby from certain interested organizations: employees of a Community Chest or other charitable, religious, or educational or scientific institutions, no part of the earnings of which inures to the benefit of any private shareholder or individual. As a result of the later special act[14] for railroad employes in interstate commerce, the latter are no longer included under the Social Security Act.

Since the tax is a federal tax, the worker will thus be "contributing" to his annuity (i.e. paying

11. Two of the first appointments being of course "short" terms of 2 and 4 years respectively (see sec. 701).

12. The size of annuity is "weighted" in favor of the low paid worker, i.e., he gets a larger percentage of his average wage than does the better paid man.

13. According to certain actuaries, the special taxes may produce less than may be needed for the Old Age Account. They believe that the average retirement age will be at a lower age than that counted upon in the Treasury forecast. Should this prove to be so, a small subsidy from other tax sources is implicit in the scheme. See M. Albert Linton, "Reserve Provisions of the Federal Old Age Security Program," pp. 7 and 8.

14. Stat. of 1935. c. 813, sec. 13. This is of course the second "Railroad Retirement Act." The first was declared unconstitutional on May 6, 1935, in the case of Railroad Retirement Board v. Alton, 295 U. S. 330.

his special tax to the United States Treasury) all his working years, however often he may shift from one state to another. If because of entry into employment late in life or because of sweated wages[15] or extremely irregular employment, an individual's annuity proves too small for a decent subsistence, he will, of course, be in need of supplementary income and will have to look to his state for the old age assistance for which federal grants-in-aid are provided. Except under such circumstances, the annuity will secure the wage earner an independent old age and the Security Bill clearly contemplates "contributory" annuities as the standard old age security device, which in time will adequately protect most of the working population.[16]

Unemployment Compensation Program

In addition to this provision for building up reserves for securing the wage earner's old age, there is (Title IX) an attempt to develop similar reserves for his protection against unemployment during his working years.

In contrast to the annuity plan, which is a straight federal venture, the unemployment compensation program contemplates state provision under federal pressure both as to the fact of and the character of the state legislation. The pressure is in the form of a payroll tax upon employers of "eight or more" with the proviso that varying credits against this tax will be permitted in states which enact unemployment compensation measures meeting stipulated requirements. The tax is levied upon payrolls for wages earned after December 3, 1935. The initial rate of tax is one percent. It will be increased to two percent in 1937 and to three percent in 1938.

Complete latitude is allowed the states in their selection of a type of unemployment compensation device. It is clearly contemplated that it may be either a straight pooled fund, made up of contributions from all employers (with or without supplementary contributions from the workers), or a scheme of individual "reserves" with a single plant or group of plants as units or a guaranteed employment plan.

In the crediting arrangements, moreover, after several years of operation of the state law, the full possible advantage to the employer of the individual reserve plan is permitted at the discretion of his state. Credit will then be allowed up to ninety percent of the federal tax, not only for the amount the employer pays[17] toward unemployment compensation provision, but also when the state permits it, for the difference between that amount paid and the maximum amount which any employer pays.[18] Thus if the state law authorizes individual reserves or individual guaranteed employment plans, the employer with a stable payroll and no labor turnover may be allowed to credit toward his federal tax the amount paid into a reserve by the employer with the greatest turnover and the least stable employment conditions. If the state allows "experience rating" in fixing contributions to a pooled fund, the employer with a low contribution rate may be permitted (up to ninety percent of the federal tax) to credit the difference between his own payment and the maximum rate of contribution to the fund.[19]

Approval of the state's unemployment compensation law by the Social Security Board is required for "crediting" and certain conditions are laid down as essential to approval. The conditions are: (1) All compensation must be paid through public employment agencies (or other agencies approved by the Board); (2) no benefits shall be payable until two years after contributions are collected; (3) all moneys must be placed in a trust fund in the United States Treasury; (4) all moneys withdrawn from this trust fund shall be used exclusively for unemployment compensation, exclusive of administration; (5) no worker shall be denied compensation because he refused (a) to be a strike-breaker, or (b) to work under conditions less favorable than those "prevailing" in the community for similar work, or (c) to leave the union of his choice or to join a "company" union; (6) rights conferred by the law must be respected subject to the power of the legislature to amend or repeal the measure.

In addition to the exceptions enumerated in the application of the taxes levied in Title VIII, employers who have not employed at least eight persons on each of some twenty days in twenty different weeks are excepted from the tax levied in Title IX.[20]

CONSTITUTIONAL BASIS FOR TAXES LEVIED BY THE ACT
(TITLES VIII AND IX)

The taxes levied by the Social Security Act are imposed upon selected classes of employers with respect to employment (Title VIII) and with respect to employment of eight or more (Title IX) and upon selected classes of employees (Title VIII). They are thus taxes upon employment of workers (the employer's taxes) and upon wages or earnings (the worker's tax).

The employer's tax is in each instance an excise on the act of employing workers. It is similar in principle to a series of taxes which Congress from time to time has imposed, such as: the tax on using carriages[21], taxes on manufacturing and selling[22], taxes on selling[23], taxes on making of gifts inter vivos[24], the tax on using a foreign built yacht[25], the tax on dealing on boards of exchange[26],

15. This would mean very low wages, as the worker after a lifetime of work, with as low as $50 a month average wage will receive $32.50 per month from his annuity.

16. It is estimated that between twenty-five and thirty million workers will be taxable when the tax is first imposed in 1937. Those persons who are never technical wage earners, i.e., who are either self-employed or "non-workers" altogether and who arrive at old age without a competence, will, of course, be dependent upon the state-federal gratuitous assistance contemplated in Title I of the Security Act.

17. Sec. 902.

18. Certain conditions must be met for "extra" crediting. They are directed at making sure that the individual reserve of the plant or the guaranteed employment plan can be expected to meet its obligations. See Sec. 910.

19. Secs. 909-910.

20. There is also an exception as to employment of listed relatives. See sec. 907.

21. Approved in Hylton v. United States (1796) 3 Dall. 171.

22. Examples: manufacturing and selling tobaccos, sustained in Patton v. Brady (1902) 184 U. S. 608; on the manufacture and sale of "oleomargarine," sustained in McCray v. United States (1904) 195 U. S. 27.

23. Thomas v. United States (1904) 192 U. S. 363.

24. Bromley v. McCaughn (1929) 280 U. S. 124.

25. Billings v. United States, 232 U. S. 261.

26. Nicol v. Ames, 173 U. S. 509.

27. Flint v. Stone Tracy Co., 220 U. S. 107.

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Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

THE KEY TO THE PUBLIC RELATIONS PROBLEM

The Award for Distinguished Public Service, recently conferred on the St. Louis Bar Association, points to an essential fact in connection with the profession's effort to solve the problem of public relations.

That fact is that the problem can only be solved, to the extent that it is capable of solution, by the activity of well organized groups. To put it in another way, it takes a group, active, courageous and inspired with the right professional spirit, to counteract the effect on public opinion of a few undesirable members of the profession.

For reasons which a fair acquaintance with the psychology of the individual and of the crowd makes apparent, the honorable careers of a thousand good lawyers often do not make the same impression on many individuals that the dishonorable acts of a single unethical lawyer are likely to make.

For one thing, the dishonorable acts are likely to furnish "news"—either for the newspapers or for current gossip. They get the advertisement while the unblemished careers of uncounted lawyers are accepted as a matter of course and receive scant notice. Most important of all, perhaps, the unethical deviations fit in with a current tradition of popular depreciation of the profession—and incidentally of other learned professions.

If existence of individual rectitude, professional conscience and professional ability in an overwhelming majority of those who practice law could be relied on to counteract the effect on public sentiment of the relatively few who are actuated by different principles, there would hardly be any question of public relations today. That there is such a problem is indisputable evidence that some other method of dealing with it is required.

The practical method is disclosed by the striking testimonial to the St. Louis Bar Association. By its zealous efforts that Association created a situation where the high character and activities of the overwhelming majority of the lawyers in a great city were brought to public attention in a way certain to make a deep impression; where the efforts of the ethical members of the profession became news and hence excited popular interest; where the thousands of lawyers of the right sort were brought forward publicly in opposition to the relatively few of the wrong sort; where, in brief, proper professional conduct received the publicity heretofore reserved to unethical conduct

This could only have been accomplished by the efforts of an organized group, like the Bar Association. The Award for Distinguished Service shows how well it performed its task. Had the award gone to an individual lawyer or several lawyers, it would not have carried the same meaning. Recognition of individual merit has been fairly familiar in the past. Recognition of the merit of a professional group is another far more significant and hopeful thing.

Fortunately the address of presentation, made by Mr. Frank C. Rand, a member of the Committee of Award, stressed the broader significance of the honor conferred. Special credit, he pointed out, went to certain officers and committee members of the Association. But he added: "Our inquiries and investigations have led us to the conclusion that the splendid achievement of the Bar Association is the result of group activity performed with good will, generous zeal and loyalty."

The lesson of this striking incident in the civic life of St. Louis and the career of the Bar Association of that city cannot be mistaken. The organized Bar is the only effective way of dealing with public sentiment in a city, State or the Nation. Better organization and more active interest all along the line are necessary if the problem is to be dealt with effectively. In the national field particularly, an improved organization of the Bar will furnish the machinery long needed for maintaining and enhancing the prestige of the profession.

A Familiar Question Answered

(Hon. William L. Ransom, President of the American Bar Association, gave the following answer to a familiar question at a dinner under the auspices of the Georgia State Bar Association and the Atlanta Bar Association, at Atlanta, Ga., on Nov. 22, 1935.)

I TAKE this opportunity for a family talk about a matter we often hear discussed, inside and outside the legal profession.

What I shall say reflects a personal view. I do not undertake to speak for the Association or for anyone except myself.

Not a few people are asking: "Why does not the American Bar Association speak out boldly in opposition to new legislation and the talk about constitutional change that are agitating the country? Why do not the lawyers, through their Bar Associations, take the leadership of public opinion in *these* matters?" Many other people, with equal earnestness, ask: "Why does not the American Bar Association boldly champion measures of social and economic reform, and align itself on the side of social justice and the public welfare? Why do not the lawyers, through their Bar Associations, take the leadership of public opinion in *these* matters?" In each instance, the questions reflect a wish that is father to the thought. The inquirer wishes the Bar Associations to take up and champion his own particular views on public and political questions.

To these and similar inquiries, the answer seems to me obvious. The legal profession and the Bar Associations are made up, as they should be, of men of widely differing political, social and economic faiths. Lawyers do not come together, in their Bar Associations, as members of one political party or the other, or as adherents of any particular set of views or social philosophy. Individually or in groups or committees, the lawyers as good citizens think and act and vote as they please, and they urge and advocate such views as they see fit, and in such ways as they see fit, publicly and privately; but they do not on that account try to force their views on the whole legal profession, through asking the Bar Associations to take up the tasks of partisan or political advocacy.

The American Bar Association and the State and local Bar Associations are actuated by a common intest in matters which affect the administration of justice, the furtherance of the law as a science, the preservation of the fundamentals of the American system of government under law, and the protection of the interests of the public in matters which involve dealings with the legal profession. In the nature of things, the American Bar Association cannot rightly sponsor special causes; still less can it be the spokesman of special interests; and it cannot soundly take up the gauge of battle in behalf of the views of any one class or group of lawyers, no matter how prominent and patriotic they may be.

Issues between warring political and social philosophies may and do agitate many lawyers deeply, but that does not make it proper that the organized Bar should take up those issues as such and espouse particular philosophies. Upon specific proposals, when they are offered and come within the scope of its chartered objects, the members of the American Bar Association do at times reach a consensus of opinion and make definite recommendations as to such measures. Usually it takes a good deal of time for such a consensus of opinion among lawyers to develop and make itself clear. Lawyers are the greatest individualists in the world; they are close to their respective communities and to local interests that give rise to a variety of views. They do not surrender their opinions to clients or to Bar Associations; they reserve the right to think and speak for themselves; they defer with some reluctance, even to a definite majority view. But when such a consensus of opinion among lawyers becomes manifest, on a matter clearly within its province and the scope of its proper recommendation, the Bar Associations try to make it effective. They would have no right to assume to speak for their members or for the legal profession, on any other basis. They would have no right or reason to try to grind the axes, or serve the purposes, of minorities in their membership. There would be an especial danger that the views of the lawyers who are better known, have the larger law offices in the larger cities, and represent the more conspicuous clients, might be brought forward as the views of the average practicing lawyer, in the smaller cities and the towns, throughout the entire country, who is the real back-bone of the legal profession in America and the actual custodian of its future. He is entitled to be heard; and until an authentic consensus of opinion is reached, in the profession as a whole, upon specific proposals, lawyers speak and act, individually or through self-constituted groups, or as members of political parties, and not in the name of the organized legal profession.

By and large, I believe that the average American lawyer has been and is faithful to the fundamentals of democratic government in this country. Above all, he cherishes the American tradition of tolerant, full and untrammelled public discussion of public questions. There must be no obstruction or challenge of the right and duty of reasoned and tolerant discussion of issues, in the great debate upon constitutional questions that is at hand. Questions of constitutional interpretation as to the powers of government are in first instance for the Courts, which will fully take care of all errors of interpretation, by whomever urged; but questions of the powers and policy of government, and the division of powers between the National government and the States, are always for the people, whose preponderant opinion and deliberate wishes become the supreme law of the land. The American lawyer is faithful to the Constitution of his country, including the three sections which contemplate its amendment in a reasoned, deliberate way and prevent its amendment in any other way.

So there can be no impropriety in the full and reasoned presentation of the merits of these matters in the forum of public opinion, by lawyers, by public officers, or by anyone else. Some persons may doubt the wisdom or good taste of particular measures of discussion, but that is hardly of major importance. Certainly it does not warrant challenge or denial of the right and duty of free discussion, in such manner and by such methods as lawyers, public officials and other citizens deem appropriate. There is no need or place for intolerance or unreason, on either side. At almost any hazard, the avenues of full and fair discussion must be kept open, must be kept free from all partisan influences and special interests which might lead to less than a reasoned judgment by the people, and must be safeguarded and defended as we safeguard and defend our institutions and our lives.

THE FEDERAL SOCIAL SECURITY ACT

(*Continued from page 789*)

the tax on the doing of business as a corporation or joint stock association.[27]

The employer's tax being an excise tax is classified as a tax that is not "direct".[28] It is, therefore, not subject to the rule laid down in the constitution for direct taxes, i.e. that they be apportioned among the several states in proportion to their population.[29]

The worker's tax is an income tax. As such, it is, obviously, freed from the apportionment requirement by the Sixteenth Amendment to the Constitution.[30] Furthermore, it has been established that such an income tax as this, i.e. one levied upon earnings derived from personal services, is an excise tax and in consequence, without regard to the Sixteenth Amendment is not, and never has been, subject to the apportionment rule.[31]

Being excises, however, both the employer's tax and the worker's tax must comply with the demand of Article I, Section 8, clause 3 of the Constitution which reads "All duties, imposts and excises shall be uniform throughout the United States." This uniformity requirement (which is the only limitation specifically imposed upon Congress in the levying of excise taxes) has been interpreted by a long line of decisions as a requirement of mere "geographical uniformity". As the court cryptically puts it in Knowlton v. Moore.[32]

"What the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states."

Quoting again, "The tax is uniform when it operates with the same force and effect in every place where the subject is found."[33] Accordingly, it has been held that an excise levied on corporations carrying on a particular type of business does not violate the uniformity requirement because partnerships and individuals carrying on the same type of business are exempt. Said the court[34], "Uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States."

In fact, the cases indicate the possession by Congress of almost unlimited discretion in picking and choosing the subjects upon which to levy excise taxes and in the classification of taxpayers for the purposes of granting exemptions or varying the rates of tax imposed.[35]

There has not been a single instance of the Supreme Court declaring a federal tax measure invalid because of unreasonable or arbitrary classifications. Such state tax measures as have been invalidated by the Federal Supreme Court for "arbitrary" classification have been in deference to the equal protection clause of the Fourteenth Amendment and there is no corresponding limitation on Congress.[36] However, there are implications in some opinions that the court might find the classification in a federal tax law so extremely arbitrary as to be a violation of the due process of law clause of Amendment V. Thus the court said[37] of the excise tax on gifts inter vivos, "It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment since they bear such a relation to the subject of the tax as not 'to preclude the assumption that the legislature, in enacting the statute, did not act arbitrarily or without the exercise of judgment and discretion which rightfully belong to it. Stebbins v. Riley, 268 U. S. 137. No more can they be a basis

28. Only "capitation" taxes, and taxes either directly upon real or personal property or upon income derived from real or personal property, have been held to be direct taxes within the meaning of the Constitution's apportionment requirement of Art. I, sec. 9, Clause 4. See Pollock v. Farmers' Loan & Trust Co., 157 U. S. 579.

29. Const., Art. I, Sec. 9, cl. 4, and for authority that excises are not direct and therefore, not subject to the apportionment rule, see Flint v. Stone Tracy Co. (1911) 220 U. S. 107, 152.

30. Const. Amendment XVI.

31. In this connection see Springer v. U. S. (1880) 102 U. S. 586 and Pollock v. Farmer's Loan & Trust Co. (1895) 157 U. S. 429, 158 U. S. 601. In holding the income tax of 1894 unconstitutional as violating the apportionment requirement, the court did so on the ground that the act was invalid as to part from which the remainder of the act was not separable. This invalid part was the tax on income derived from real and personal property which the court held to be a "direct" tax and void because not apportioned. The court clearly indicated that it was not overruling Springer v. U. S., supra, so far as that case held that a tax on income received for personal services was an excise tax, and, therefore, valid without apportionment. See Pollock v. Farmers Loan & Trust Co., 157 U. S. at pp. 578-579, 589 and 158 U. S. at 635-637. This view has been reiterated by the Court since the adoption of the Sixteenth Amendment. Brushaber v. Union Pacific R. R. Co. (1916) 240 U. S. 1; Bowers v. Kerbaugh-Empire Co. 1926) 271 U. S. 170, 174.

32. 178 U. S. 41, 108 (1900). Note exhaustive discussion of question of uniformity in this case, especially from p. 81 to p. . Also note reference to constitutional history as indicating the propriety of the interpretation adopted, since the *original* wording of this clause included the words "and equal" as well as the demand of uniformity, and the words "and equal" were stricken out in committee after prolonged discussion. See p. 104.

33. Head Money Cases (1884) 112 U. S. 580, 594.

34. Flint v. Stone Tracy Co., 220 U. S. 107, 158.

35. See cases referred to in notes 22-27 supra, also for carrying rates and exemptions, see Knowlton v. Moore, 178 U. S. 84, Brushaber v. Union Pac. R. R. Co,. 240 U. S. 1; see also Bromley v. McCaughn, 280 U. S. 124; Van Oster v. Kansas, 272 U. S. 465, 468; McCray v. United States (1904) 195 U. S. 27, special tax of ten cents on a pound of yellow oleomargarine and one-fourth cent a pound on white oleomargarine.

36. See Lewisville Gas & Elec. Co. v. Coleman (1928) 277 U. S. 32; also Schlesinger v. Wisconsin (1925) 270 U. S. 230. It might be remarked that the list of products upon which high tariff rates are imposed would be difficult to justify upon any theory of classification.

37. See Bromley v. McCaughn, at p. 139, cited supra notes 24, 35.

for holding that the graduation and exemption features of the present statute violate the Fifth Amendment."

As to a possible constitutional challenge on the basis of such implications, of the classification of employers for taxation purposes in Titles VIII and IX, it may be remarked that the groups exempted from the taxes are the familiar exemptions found in police regulations such as workmen's compensation laws, payment of wages acts and similar protective measures. These exemptions have been uniformly sustained.[38]

Unemployment Compensation on Tax—(Title IX)

From the standpoint of constitutionality, there seems to be only one major issue involved in the tax imposed in Title IX: Will the United States Supreme Court accept the "tax with respect to employment of eight or more" as such, or will it decide that it savors so largely of an attempt to secure specified unemployment insurance arrangements as to be a regulatory rather than a taxing measure? The problem presented cannot be resolved with certainty by reference to any adjudicated cases. Its factual aspects differ from any situation previously reviewed by the Supreme Court.

An analysis of the principles involved, however, in the light of the previous decisions which concern these principles will serve at least to indicate the considerations which the court will be called upon to weigh when passing upon Title IX of the Social Security Act.

Argument Against Constitutionality of the Tax in Title IX

Those who contend that these unemployment tax provisions comprise a regulatory measure masquerading as a taxation measure may be expected to lean heavily upon three decisions of the Supreme Court—the Child Labor Tax Case[39], the case of Hill v. Wallace (Grain Exchange Tax Case)[40] and the case of Hammer v. Dagenhart (Anti-Child Labor Interstate Commerce Regulation Case).[41] In all three of these cases the Congressional measure reviewed was held to be a pretended exercise of an unquestioned Congressional authority to accomplish a regulatory end not properly within the powers conferred upon Congress by the federal Constitution. In the first two cases the power professedly used was the taxing power; in the third, the statute purported to be a regulation of interstate commerce. In the last case—Hammer v. Dagenhart—the Congressional act under review fixed a standard of child labor and debarred from interstate and foreign commerce for a period of thirty days from its production, all products from a mine, quarry or mill, etc., in which the standard fixed did not prevail. The Supreme Court, in holding this Act unconstitutional and invalid, stated:

"In our view, the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."[42]

And again[43], "The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution." . . . "Over interstate transportation or its incidents, the regulatory power of Congress is ample but the production of articles intended for interstate commerce is a matter of local regulation."[44] The Court thus found that the enactment under review was in reality an attempt to standardize local manufacturing conditions in the several individual states, (a matter properly within the police power reserved to each state) under the guise of an interstate commerce regulation.

The Child Labor Tax Case and the Grain Exchange Case both involved purported excise taxes levied by Congress.

In the Child Labor Tax Case a tax equal to ten percent of the annual net profits was levied on mines, quarries and mills in which children under fourteen were employed or in which children under sixteen were employed under other than stipulated conditions. Persons who hired children in violation of the standard through bona fide mistake as to their age were excused from the tax. Both the Commissioner of Internal Revenue and the Secretary of Labor on request of the Commissioner of Internal Revenue, were authorized to enter and inspect places of employment. In declaring this statute unconstitutional the Supreme Court stated:

"The analogy of the *Dagenhart Case* is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution."[45]

In support of its finding that the statute was essentially a regulatory rather than a taxing measure, the court mentioned several times in the

38. See Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, and cases therein cited (employers with less than five employees excepted from act); N. Y. Central Ry. Co. v. White, 243 U. S. 188 (exceptions of domestics, farm labor, casuals, etc.); also see cases cited in A. B. Honnold, Workmen's Compensation, Sec. 17.

39. 259 U. S. 20.

40. 259 U. S. 44.

41. 247 U. S. 251.

42. Idem. 276.

43. Idem, p. 275.

44. Idem, p. 272.

45. 259 U. S. 20, 39.

course of the opinion that the regulatory object appeared "on the face of" the statute itself. Specific attention was called, in illustration of this fact, to the clause permitting remission of the tax in case of good faith mistake as to the age of children employed[46], and to the clause permitting inspection by the Secretary of Labor "whose normal function is the advancement and protection of the welfare of the workers".[47]

In the Grain Exchange Case[48] a tax of twenty cents a bushel was imposed upon contracts of sale for future delivery of grain with two exceptions. These were (1) when, at the time of sale, the seller held or owned the grain or owned or rented the land on which the grain was to be grown; (2) when the contract was made by or through a member of an exchange or board of trade which was designated a "Contract Market" by the Secretary of Agriculture, such designation to be made only when certain stipulated conditions were met.

In holding this act unconstitutional, the Supreme Court stated that it involved principles similar to those passed upon in the Child Labor Tax Case. The court again made reference to the fact that the actual character of the act appeared on its very face. Said the court, "The act is in its essence and on its face a complete regulation of boards of trade with a penalty of twenty cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill and is so clear from the effect of the provisions itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

Arguing from these authorities it will probably be contended that (1) Title IX is essentially a regulatory rather than a taxing measure; (2) it reveals "on its face" that it is enacted for the express purpose of forcing the states to enact unemployment compensation laws of a stipulated character rather than for the purpose of raising revenue; (3) it is thus an unwarranted intrusion of the Federal Government into the field of local police power which by virtue of the Tenth Amendment to the Constitution belongs exclusively to the States.

In support of the foregoing three points the following detailed references may be expected:

(1) Title IX is part of a general welfare measure as is conceded by the title of the Act.[49]

(2) The so-called "tax", to the extent of ninety percent of its amount, may be escaped altogether in a state which has enacted a state unemployment compensation law which is "approved" by a federal welfare agency called the Social Security Board.[50] Thus it will be argued, "on the face of" the act it is apparent that a *regulatory* rather than a *revenue* objective is sought by the "tax" imposed.

(3) The required conditions for "approval" of a state law by the Social Security Board are listed in §903 and by their number and obvious "police power" character can leave no doubt as to the regulatory nature of the legislation.

They standardize inter alia:

(1) Methods of payment of unemployment compensation (i.e. through a public employment agency or other agency approved by the Social Security Board);

(2) Types of and conditions of work which an unemployment compensation scheme may not force an employee to accept on pain of losing his benefit;

(3) Method of handling reserve funds;

(4) Qualifying accumulation period which must ensue before benefits will be payable.

Argument in Defense of Constitutionality of Tax in Title IX

The most likely answer to the charge that this is not a tax may be expected to run as follows: This is a true revenue-producing measure for under all circumstances a tax must go into the federal treasury from every employer in the classes subjected to the act. It is only the size of the tax not the fact of the tax that depends upon the so-called "regulatory conditions" contained in the act. Moreover, these so-called regulatory conditions merely define the classes upon which the different rates of taxes are imposed. The fact that employers are divided into classes and subjected to different rates of taxation is clearly not constitutionally objectionable. Previous decisions have settled that Congress may classify for purposes of levying excise taxes and may apply progressive rates of taxation to these different classes.

The fact that the classification of employers depends primarily upon conditions controllable by state law is not constitutionally objectionable. It has been held that Congress may levy an excise tax on subject matter the very legal existence of which depends upon state law. Thus in the License Cases[51] a federal tax was levied upon vendors of alcoholic liquors and lottery tickets, industries that could be prohibited under police measures of individual states. State prohibition successfully enforced would deprive the federal government of any revenue from that source in the state. It has been held[52] moreover proper for Congress to levy on estates of deceased persons a tax on legacies and distributed shares arising from personal property, the amount of which federal tax[53] depends upon state law and varies from state to state even upon estates consisting of identical amounts.

Likewise in this Social Security Act, whether the tax (under Title IX) collected by the Federal Government shall be ten per cent or one hundred per cent of a specified rate, or, put in another way, whether as to a possible ninety per cent of the proposed maximum tax there will be any subject matter, and, if so, how much subject matter there will be, depends on the legislative will of the individual states. To illustrate, in the year 1936, a tax equal to 1/10 of 1% of the payroll is levied on all employers of eight or more; a tax equal to an

46. Said the Court, "Scienter is associated with penalties not with taxes." p. 37.

47. Idem, p. 37.

48. Hill v. Wallace, 259 U. S. 44.

49. Cf. statement of court quoted above relative to the title of the Grain Exchange Act.

50. Cf. statement in Child Labor Tax Case, quoted above, referring to Secretary of Labor's power of inspection of work shops in connection with the tax.

51. 6 Wall. 462 (1867). It would not be accurate to state that the actual existence depends in all cases on state laws. The cases referred to concerned inter alia the taxing of lottery dealers found operating in New York, Massachusetts, and New York in defiance of the laws of these respective states, pp. 463-465.

52. Knowlton v. Moore, 178 U. S. 84.

53. Since the distributed share allotted to a spouse was exempted and since this share varies from State to State. Ch. 448, sec. 29, subdiv. 5.

additional 9/10 of 1% of the payroll is levied on all employers of eight or more who are not subjected to any unemployment insurance arrangement by the laws of the state in which they operate. An additional tax ranging from 1/10 of 1% to 9/10 of 1% of the payroll (i.e. falling between these outside minimum and maximum tax limits) is levied on other employers in varying situations controllable by the state laws in which they operate.

Thus, in 1936 when the maximum rate of federal tax (under Title IX) will be 1% of the payroll, if Arizona requires an employer subject to this act to contribute one-half of 1% of his payroll to an unemployment compensation fund, such employer will fall in a class, members of which must pay a federal tax equal to one-half of 1% of the payroll. If Mississippi requires an employer subject to this act to contribute one-fourth of 1% of his payroll to an unemployment compensation fund, such employer will fall in a class, members of which must pay a federal tax of three-fourths of 1%. Examples of this order can be multiplied but would merely serve to further illustrate the principle involved.

To this argument there might be raised the possible objection that this tax is not actually levied at different rates upon different classes but is levied uniformly at one rate with a possible set-off under specified circumstances. This seems clearly an objection to form not substance. Moreover, the specific technique used in these unemployment insurance cases, that is, uniform tax rate with possible variable set-offs, already has been employed by Congress in its inheritance tax measures of 1924 and 1926.[54]

This federal inheritance tax measure provides that the full amount of state inheritance tax paid may be credited against the federal tax up to a maximum limit of eighty per cent of the federal tax otherwise due. The constitutionality of this procedure was gratuitously conceded by the Court in a dictum in Florida v. Mellon.[55] It said: "The act assailed * * * must be held to be constitutional * * *. The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States.[56]

In specific answer to the use of the two Child Labor cases and the Grain Exchange decisions as precedents for declaring the unemployment compensation tax unconstitutional and therefore invalid, it will undoubtedly be pointed out in defense of Title IX that all three of those cases were attempts at direct regulation by the federal government of local conditions. In two instances pressure was brought directly to bear upon the "taxpayer" to comply with certain federal requirements or be taxed, the "tax" being thus, as the court in fact stated[57] in the nature of a penalty to coerce compliance with regulations that properly should emanate from a State rather than a National legislature. In the Dagenhart Case the manufacturer was required to comply with federal regulations as to child labor or be denied permission to ship in interstate commerce channels. The purported interstate commerce regulation was declared to be in effect an attempt to control local conditions properly subject to the state police power.[58] In fact, it was in defense of the states' reserved police power that the court in all three cases expressed itself most strongly and it was due to what the court deemed usurpation by Congress of power properly vested exclusively in the states, that the court was moved to declare the purported tax or interstate commerce regulation a mere sham and pretense. It was the ouster of the state that was so strongly objected to.

In the case of the unemployment compensation tax, however, the situation is radically different. No direct regulation by the federal government is attempted. In fact, it does not lie in the power of the individual employer who is subject to the tax, to escape the tax either in whole or in part except as *state* law may enable him to do so. Only through state legislation, in proper expression of its police power, may the rate of federal tax vary.

There is, thus, in the unemployment tax situation no ouster of the state, merely a tax imposed by the federal government in varying amounts under conditions controllable by state law-making bodies.

Constitutional Problems Involved in the Annuity Program

The provision for retirement annuities rests upon both the taxing and the spending power of Congress. Title II sets up the old age account, enumerates the beneficiaries of this account, defines their "old age benefits" and authorizes appropriations for building the account to a size sufficient to provide the promised benefits. Title VIII imposes taxes of unquestioned excise character to bring revenue to the treasury to compensate for what will be drained out of the Treasury by the annual appropriations authorized for the building up of the old age account.

Considering Title II by itself, it may be contended that as it involves appropriations from the federal treasury for the direct benefit of aged persons, it is unconstitutional in spending federal money for a "non-federal purpose." This contention raises two questions:

(1) Are there limitations upon the federal spending power?

(2) If there are such limitations, by what procedure can the question be raised?

There is no authoritative answer to the first question. It has been persuasively argued that there are no constitutional limitations upon Congressional spending.[59] Moreover, even if there are certain limitations, they would not necessarily pre-

54. 43 Stat. 253, Ch. 234, § 301 (b), 44 Stats. 9, Ch. 27, § 301 (b).

55. (1926) 273 U. S. 12, at p. 17.

56. Idem.

57. See Child Labor Tax Case, cited supra note 39, at p. 36, 38, and Hill v. Wallace, cited supra note 40, at p. 66.

58. See Hammer v. Dagenhart, cited supra in note 41, at pp. 275, 276.

59. See Ed. S. Corwin, "The Spending Power of Congress," 36 Harvard Law Review 548 (1923); also argument for Mellon in Massachusetts v. Mellon, and Frothingham v. Mellon, cited supra notes.

clude Congress from building up retirement annuities for the country's wage earners. In the absence of judicial interpretation of the welfare clause of the Federal Constitution, no one can state with conviction that spending for any specific social welfare purpose is outside the limits of Congressional authority.

Conceding, however, for purposes of argument that such spending as is contemplated in Title II is improper and in excess of the constitutional power of Congress, there remains the problem of how this question may be raised. Here the cases of Massachusetts v. Mellon and Frothingham v. Mellon, discussed earlier in this article, are pertinent.[60] By their holding that neither a state nor an individual taxpayer has any standing to request a constitutional review of a federal appropriation statute, they suggest that the procedure for challenging federal expenditure may be lacking.

Turning to Title VIII which is the taxing title, it may be said that considered alone it seems immune to constitutional attack. It imposes straight unequivocal taxes of unquestioned excise character not to be distinguished in the principles which they involve from taxes previously imposed by Congress and approved by the Supreme Court.[61] There would seem to be only one possible method of challenging the constitutionality of this title, to-wit: by the contention that Title VIII and Title II should be read together and that VIII, therefore, forms a part of a regulatory old age insurance program and that its "taxes" are not taxes in any real sense of the word, but are insurance premiums or contributions from the workers and their employers. On both principle and also on authority, it may be hazarded that the probabilities are against the court's countenancing such contention. The reasons for such hazard reveal themselves in an analysis of the actual provisions of the law.

Title II pledges Congress to a policy of paying to employees in industry, commerce and trade, etc., retirement annuities related in amount to the wages they earn in 1937 and thereafter. A permanent appropriation is authorized the annual amount of which is to be an amount certified by the United States Treasury. This is to be equal to the estimated premium which on actuarial principles will be required for reserves sufficient to yield the promised annuities.[62] This appropriation is to be made from the general treasury of the United States and is not made dependent upon or even necessarily the equivalent of specified tax proceeds.

The taxes levied in Section VIII which, it is hoped and planned, will bring to the Federal Treasury enough to cover the annual appropriation to the Old Age Account are not legally dedicated to that end. The taxes like other taxes imposed by Congress, go to swell the general funds belonging to the United States, in no way earmarked for any special use. In addition, not only are the benefits and taxes legally separate and unrelated but in practical operation they are independent of each other. For example, should it turn out that the revenues from the tax imposed in Section VIII produce because of bad employment conditions in successive years less than the amount counted upon in the actuarial computations, this fact does not affect the obligation to appropriate the amount equal to the requisite annual premiums. The converse is similarly true.

The retirement annuities, moreover, are related in size to wages earned not to taxes paid. The fact that through inadvertence, mistake or deliberate non-compliance, taxes due from certain employees and their employers may not be paid for longer or shorter periods does not alter the size of the annuity nor the obligation of the government to provide it. In short, nowhere in any provision of the Social Security Act is there a tie-up between the taxing provisions of Title VIII and the retirement annuities and other benefits provided in Title II. Even the connection which existed in the plan that produced the measure, i.e. the principle that taxes on employers and their workers should be the source of the additional revenue needed to finance the obligation assumed by the Federal Government of accumulating funds to insure the old age of employed workers, is implicit in the act only as an approximation or a probability. Moreover, such connection must be dug out of the legislative discussions that preceded the enactment of the law. It is not revealed "upon the face of" the measure.[63]

The Supreme Court, in all of the cases in which it has reviewed a purported tax law challenged on the score that it was in reality something else, has stated and reiterated that it would go no further than the statute itself to determine its character. In conspicuous cases it has refrained from doing so. No one, for example, could be so foolish as to contend that the court was actually ignorant that the purpose of the tax on oleomargarine at issue in the McCray Case[64] was to suppress that foodstuff, rather than to raise revenue, nor that the purpose of the tax on state bank notes (approved in the Veazie Case[65]) was to suppress such currency. The court, however, in each case refused to examine the motive of Congress except as revealed by the terms of the statute itself. Similarly in condemning the taxes at issue in the Child Labor Tax Case and the Grain Exchange Case, the court stressed the fact that the character of the legislation as other than taxing was patent upon the reading of the law.[66]

It would seem highly improbable that the court in passing upon Title VIII, will turn from its long established policy of judging purported taxation measures by their own language. It would seem still less likely, even if this be done, that the court will find that sufficient connection exists between Titles II and Titles VIII to warrant a claim that the latter section does not impose bona fide taxes.

Conclusion

In summary it may be stated that all parts of the Social Security Bill are an acknowledgment of a situation, the existence of which has long been alleged by students of social problems, i.e. that our Poor Law with its local "parish" unit of assistance

60. Cited in footnotes 7 and 8 supra.
61. See paragraphs, p. , and footnotes 21-28, supra.
62. And related benefits; see previous expositional discussion.
63. Indeed it would be quite impossible for anyone unacquainted with such background to know for what purposes the annuity tax was levied. Many new expenditures are included in the Social Security Bill for any of which this tax might be intended.
64. Cited supra, note 22.
65. Veazie Bank v. Fenno (1869) 8 Wall. 533.
66. Child Labor Tax Case, cited supra, note 39, at p. 42, Hill v. Wallace, cited supra, note 40, at p. 67.

to the needy, which has been perpetuated since the original Elizabethan Poor Law, is a totally inadequate institution; that although that ancient institution was adapted admirably to the needs of the period which produced it, when people lived, labored and died for the most part within a few miles of their birthplace, it has long since ceased to be an appropriate device; that this is due to the fact that a considerable section of our workers are never permanently localized even within a particular state and a much larger percentage do not spend their lives within the smaller areas of lesser political units.

All parts of the Social Security Bill emphasize the need of increasing the unit size of the area of responsibility for distressed groups. The federal grants-in-aid of assistance to various types of needy persons are in each case conditioned upon financial participation by the states, thus insuring that both federal and state funds will be drawn upon in part for sustaining the burden of support of the economic dependents concerned.

The more significant sections of the Act, moreover, the so-called "unemployment insurance" and "old age insurance" titles, do far more than merely accept the need of increasing the size of the geographical and political unit of responsibility inherited with the Elizabethan Poor Law. They evidence a belief in the inherent inadequacy of the "poor relief" method and the superiority of directing public effort toward the prevention of destitution rather than the mere assistance of needy persons. They accept the theory that workers (with the aid of their employers) when well and at work should be required to contribute regularly toward a common fund or funds which will insure their maintenance when they are unable to work or cannot find employment. In short, they mark the beginning of deliberate expansion of the social insurance method hitherto confined in this country to insure against industrial accidents. This seems to most students of economic and social affairs, alarmed by the apparently endless social cost of the "dole" or "breadline" system, to be the beginning of wisdom.

Titles II, VIII and IX in the Social Security Bill have unquestionably used the taxing power to accomplish their social insurance objectives. Such a motive on the part of Congress must be freely conceded. Whether such a motive, however, renders the legislation improper is quite another question. It may perhaps find its answer in such a statement as that contained in the concluding paragraph of the recent case of Magnano Co. v. Hamilton[67] which reads:

"From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."

67. (1934) 292 U. S. 40, at p. 47.

1936 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION, PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

Information for Contestants

Subject to be discussed:

"The Origin of the Rule-Making Power and its Exercise by Legislatures."

Time when essay must be submitted:

On or before March 2, 1936.

Amount of Prize:

One Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, officers, members of executive committee, and employees of the Association.

No entry will be accepted unless written specially for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted. Any essay not desired for further use by the Association will, upon request of its author, be returned and the interest of the Association therein waived.

No entry shall contain more than 5,000 words, footnotes included. Each contestant must agree to abide by the decision of the executive committee in the selection of the winner and on any question raised.

Procedure:

Any one wishing to enter contest will communicate promptly with Olive G. Ricker, Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish:

(a) entry number in quadruplicate, in a container sealed prior to receipt of any application, so that the number therein may be known only to the recipient;

(b) large envelope, addressed, for mailing essay;

(c) small envelope, addressed, for mailing one of the entry numbers together with printed form to be filled in by the contestant to show name and address; which will thereafter not be opened until the winning essay has been selected and its identifying number announced.

Essay is to be submitted in triplicate, typewritten, single or double spaced, on one side of plain white paper, letter size (8½ x 11), and mailed as first class matter, without folding, in the envelope (b) furnished for that purpose, on or before March 2, 1936. Total number of words on each page will be typed on bottom of each page of one copy. For identification, one of the entry numbers (a) furnished for that purpose will be affixed to each of the three copies of the essay; any other identifying mark on the essay or the envelope (b) containing same, or on the envelope (c) containing fourth number, name and address, will disqualify the entry.

The fourth entry number (a) will be attached to a printed form on which the entryman will type full name and address, sign the agreement printed thereon, and then seal for mailing in the envelope (c) furnished for that purpose. The envelope (c), when prepared for mailing, will be held by the entryman until March 3, 1936, and then mailed. It is not to accompany the essay in envelope (b) which must be postmarked not later than March 2.

No additional information will be given by the Executive Secretary. Any questions raised will be submitted to the executive committee for consideration.

REVIEW OF RECENT SUPREME COURT DECISIONS

Income of Divorced Wife Received from Trust Estate Established by Husband Is Taxable as the Latter's Income Where Trust Agreement Was Made Effective by Decree of Divorce—Discrimination Against Federal Instrumentalities in Application of Pennsylvania Statute Laying a Tax on Shares of Trust Companies—Transfer of Property to a Trustee, for the Benefit of Others, Prior to Decedent's Death, Held Taxable Under §302 (d) of 1926 Revenue Act, Even Though Transfer Was Complete and Power to Amend, Revoke or Modify Reserved by Grantor Could Be Exercised Only with Consent of Beneficiary—Case Where the Same Section Is Not Applicable—State Power to Prescribe Containers for Horticultural Products, etc.

By Edgar Bronson Tolman*

Taxation—Income Tax—Alimony Paid by Husband as Taxable Income

Income received by a divorced wife from a trust established by her husband, in connection with a divorce proceeding, is taxable as income of the husband, where the trust agreement creating the trust was made effective by the decree of divorce, since, in such circumstances, the income from the trust was devoted to the discharge of the husband's legal obligation under the decree.

Douglas v. Willcuts, 80 Adv. Op. 10; 56 Sup. Ct. Rep. 59.

This opinion related to the question whether income derived from an irrevocable trust, created by a husband in connection with a divorce proceeding, in lieu of alimony, is taxable as income to the husband. The petitioner paid under protest the tax assessed in respect of the income, and sued for a refund. The suit resulted in judgment for the petitioner, which was reversed by the Circuit Court of Appeals. On certiorari this was affirmed by the Supreme Court, in an opinion by Mr. Chief Justice Hughes.

A considerable portion of the opinion is devoted to an analysis of the legal effect of the trust agreement in connection with the decree of divorce. The conclusion was reached that the trust agreement became effective not by virtue of the act of the husband in creating the trust, but derived its legal force from the decree of divorce approving it, since the court was free to impose other terms.

In this view it was concluded that the income from the trust, being in discharge of the husband's legal obligation, was taxable as the husband's income. In this connection the learned Chief Justice said:

"Amounts paid to a divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support, which is made specific by the decree. . . Petitioner's contention that the district court did not award alimony is not supported by the terms of the decree. It described the provision as made 'in lieu of all *other* alimony or interest in the property or estate of the defendant.' However designated, it was a provision for annual payments to serve the purpose of alimony, that is, to assure to the wife suitable support. The fact that the provision was to be in lieu of any other interest in the husband's property did not affect the essential quality of these payments. Upon the preexisting duty of the husband the decree placed a particular and adequate sanction, and imposed upon petitioner the obligation to devote the income in question, through the medium of the trust, to the use of his divorced wife.

"No question is raised as to the constitutional power of the Congress to attribute to petitioner the income thus segregated and paid in discharge of his obligation, and that authority could not be challenged successfully. . . The question is one of statutory construction. We think that the definitions of gross income (Revenue Acts, 1926, Sec. 213; 1928, Sec. 22) are broad enough to cover income of that description. They are to be considered in the light of the evident intent of the Congress 'to use its power to the full extent' . . . We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor. . . The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. . . In the present case, the net income of the trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly.

"We do not regard the provisions of the statutes as to the taxation of trusts, fiduciaries and beneficiaries, (Revenue Acts, 1926, Sec. 2, 219; 1928, Secs. 161, 162) as intended to apply to cases where the income of the trust would otherwise remain, by virtue of the nature and purpose of the trust, attributable to the creator of the trust and accordingly taxable to him. These provisions have appropriate reference to cases where the income of the trust is no longer to be regarded as that of the settlor, and we find no warrant for a construction which would preclude the laying of the tax against the one who through the discharge of his obligation enjoys the benefit of the income as though he had personally received it."

The case was argued by Mr. Leland W. Scott for the petitioner, and by Assistant Attorney General Wideman for the Government.

*Assisted by James L. Homire.

Constitutional Law—State Tax Discriminatory Against Government Bonds

In determining value of shares of a trust company, for purposes of taxation, a Pennsylvania statute, as administered, measures the tax by reference to so much of the net assets of the company as is not represented by shares of Pennsylvania corporations already taxed or exempt from tax. As so applied the tax is invalid as discriminatory to the extent that bonds of the Government, and of federal

instrumentalities, and stocks of national banks are not also eliminated in like manner as shares of Pennsylvania corporations which are excluded in determining the net assets, since, otherwise, the operation of the tax is discriminatory in favor of the securities of the state corporations, and against the federal securities and national bank stocks.

Schuylkill Trust Co. v. Pennsylvania, 80 Adv. Op. 15; 56 Sup. Ct. Rep. 31.

This opinion dealt with the validity of certain provisions of a Pennsylvania statute imposing a tax relating to trust companies. The tax is denominated a tax on shares. The appellant, a trust company, contended that the Act discriminates against Government bonds and national bank stocks. The State contended that the tax was on the shares rather than on the assets of the trust company, so that no tax whatever was laid on the assets of the appellant.

Prior to 1907 trust companies were liable for a capital stock tax levied on the corporation. In administering this tax United States bonds and national bank shares were eliminated from the tax by deduction of their value from the total assets of the owning company, the purpose of such elimination being to avoid double taxation, on the theory that the shares issued by a corporation and its capital stock are identical.

By an act passed in 1907 the State prescribed another method of taxation, which, in terms, lays a tax upon shares rather than on corporate assets. The value of each share is to be ascertained by adding the value of capital stock paid in, surplus and undivided profits, and dividing the total by the number of outstanding shares. By amendments, it was directed that the value of each share should be ascertained by adding together so much of the amount of capital stock paid in, surplus, and undivided profits as is not invested in the shares of stock of corporations liable to pay the state a capital stock tax or tax on shares, or relieved from the payment of capital stock tax or tax on shares, and dividing the sum by the number of outstanding shares.

By a divided bench, the Supreme Court held the challenged provisions invalid, as to the United States bonds and other Federal securities, as unduly discriminatory. The prevailing opinion was delivered by MR. JUSTICE ROBERTS. In his opinion he explained the operation of the statutory provisions, in the following statement:

"The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by intrumentalities of the Federal government.

"It will be observed that by the amendments to the Act of 1907 the measure of the tax is not in any sense the value of the shares as such but a value reflected by *so much* of the net assets as is not represented by shares of Pennsylvania corporations already taxed or exempt from tax. In the administration of the act as amended the procedure which has been followed and approved is first to deduct the liabilities from the total assets, thus arriving at the net assets. The theory has been that exempt shares owned by the trust company must be shown to have been actually purchased out of capital stock or surplus in order to obtain a deduction of their full value from the gross assets. If the company is unable to demonstrate that they were purchased in that manner then a proportional method of deduction is adopted. This is to apply to the taxed value of all such exempt securities a fraction the numerator of which is the net assets and the denominator the gross assets. The result of applying this fraction to the taxed value of exempt shares is said to give the proportion of those exempt shares attributable to capital, surplus, and undivided profits, and the quotient is accordingly deducted from the value of the net assets to obtain the measure of the tax on all the shares, and this divided by the number of outstanding shares, gives the measure of the tax for each share. In the instant case the trust company held amongst its assets shares of Pennsylvania corporations, exempt from tax, of the value of $135,787. It also held shares of the Philadelphia National Bank of the value of $20,202. These were found by the Department of Revenue to have been taxed at a total taxable value of $71,373. Applying the fractional formula mentioned it was found that $8,886 of their taxable value should be attributed to capital, surplus and undivided profits, and deducted from the amount of the net assets. As the net assets had been ascertained to be $467,714 the deduction brought this figure down to $458,028 to which the rate of tax of five mills was applied."

After stating the appellant's contention that the tax is one on assets, and the appellee's position that it is an exaction on the shares, MR. JUSTICE ROBERTS said:

"We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax. The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax them twice. If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership. If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities."

Dealing next with the tax in relation to the National Bank stock owned by the appellant, MR. JUSTICE ROBERTS stated that the question might well be left by reference to what was said as to the other securities. He added, however, that the discrimination is more obvious, and said:

"The discrimination here disclosed is, however, more obvious than in the case of the other securities mentioned. The Commonwealth of Pennsylvania elected to exempt certain shares of stock of its own corporations because they had already been taxed. It exempted them because to include them in the base would be in effect to tax them a second time. The shares of the Philadelphia National Bank had also been taxed pursuant to R. S. 5219, and if they were to be treated on an equal footing with shares of domestic corporations the State was bound to afford them a similar exemption from a second exaction."

MR. JUSTICE CARDOZO delivered a dissenting opinion in which Mr. Justice Brandeis and Mr. Justice Stone joined. This dissent was limited, however, to the validity of the tax so far as it related to the inclusion of the government bonds. In the dissent empha-

sis was laid upon the fact that the statute was not passed as an act of unfriendly discrimination, and the fact that the exemption does not relate to any obligations that are in substantial competition with the government securities. In development of these views MR. JUSTICE CARDOZO said:

"The statute was not passed as an act of 'unfriendly discrimination' . . . against the national securities, nor was it passed in aid of classes of investments with which the national securities are in substantial competition. In the absence of one or other of these motives or results the prejudice, if any, is too remote to be forbidden. There is no room in the solution of problems of this order for doctrinaire definitions, heedless of practical results. . . 'In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other' . . . A sterile formalism would quickly lead to an impasse, the activities of the states checked because of an indirect effect upon the agencies of the federal government, and the federal activities checked for fear of a like effect upon the agencies of the states. One must view the subject in a large way if government is to go on at all. . .

"'Unfriendly discrimination' might be inferred if securities of every kind were excluded from the reckoning with the single exception of the obligations of the national government. That would be an extreme case, the conclusion hardly doubtful. Even though hostility were not so pointed as in the case supposed, there might still be an invidious distinction if securities in substantial competition with evidences of indebtedness issued by the national government had been given a preferred position. Nothing of the kind appears. 'For reasons of public policy and not as an unfriendly discrimination' . . . , the value of a share in a trust company is to be ascertained by excluding from the assets the shares in other corporations that are liable to the state for a tax upon their capital. Let it be assumed, for illustration, that a trust company is the owner of shares of stock in a department store doing business in Philadelphia. Under the statutes of Pennsylvania a business of that kind pays a tax upon its capital. A trust company does not. If it did, a hardship akin to that of double taxation would result if its interest in the department store were made use of to magnify its burden. But the process of taxation does not end at that point. By the plan of the statute the assessor passes over the trust company and lays the tax upon the shareholders. The same considerations of fair dealing and equality are then applicable to them. So at least the legislature of Pennsylvania might not unreasonably believe. Never before has it been held that out of deference or favor toward the securities of government a state is disabled from framing its system of taxation along lines of equity and justice.

* *

"The situation, then, is this. Vast classes of securities —bonds and notes of every kind, as well as shares of stock in many and varied enterprises—are in the same position for the purpose of the tax in suit as government bonds and notes. The few investments that occupy a different position are not comparable in kind or in attractiveness to the obligations of the government and do not substantially compete with them. To hold that there was discrimination here in any forbidden sense is to hold that bonds and notes of the United States must be deducted from the value of the shares if there is a deduction of any form of investment, no matter how minute in amount or alien in quality. Assume, for illustration, an exemption of the shares of corporations engaged in the manufacture of books or in the sale of works of art, an exemption accorded in furtherance of a policy to foster art and letters. If the prevailing opinion stands, the policy in such a case must be abandoned or the federal bonds included. Assume again that laundering corporations only had been relieved by Pennsylvania from liability for a tax upon their capital. Laundering corporations, as we have seen, were actually relieved, but manufacturing corporations also. The prevailing opinion, if it stands, would bring us to a holding that laundering corporations could not be favored without hostility and peril to the treasury at Washington. This is to lose sight of the essence of discriminatory statutes and to stick in the bark of a hard and narrow verbalism."

The case was argued by Mr. John Robert Jones for the appellant, and by Mr. Manuel Kraus for the appellee.

Taxation—Estate Taxes—Transfers Inter Vivos

Under §302 (d) of the Revenue Act of 1926, a transfer of property to a trustee, for the benefit of others, prior to the decedent's death, is subject to the tax where the grantor reserved the power to alter, amend, or revoke the trust. As to such a transfer the tax is applicable and valid, even though the transfer was complete and the power reserved was qualified, so that it could be exercised only with the consent of the beneficiary.

Helvering v. City Bank Farmers Trust Company, 80 Adv. Op. 1; 56 Sup. Ct. Rep. 70.

This opinion dealt with questions whether Section 302 (d) of the Revenue Act of 1926 requires inclusion in the gross estate of the value of the corpus of a trust established in 1930, where the grantor reserved a power to revoke or modify, to be exercised jointly with a beneficiary and the trustee; and whether, if so included, the action violates the Fifth Amendment.

The section in question provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* *

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . "

In 1930 the grantor, Mrs. James, transferred to a trustee certain securities, upon a trust to continue during the lives of her two daughters or the survivor of them. The income was to be paid to her until her death, or until the termination of the trust, whichever should first occur. After her death, the income was to be paid to her husband, if he survived. If he did not survive the grantor, or upon his death, the income was to be distributed among their issue per stirpes. Upon termination of the trust the corpus was to be delivered to the husband, if alive; if not, to the grantor, if living, or if she were dead, to the beneficiaries at that time entitled to receive the income; if there were none such, to the heirs at law of the husband. The settlor reserved the right to revoke, alter, or modify the trust, but only with the written consent of the trustee and the settlor's husband, or if he were dead, with the consent of the settlor's brother and the trustee. If they could not agree, the decision of the husband or the brother, as the case might be, was to be final. The husband survived the grantor, and her death occurred prior to termination of the trust.

The Commissioner of Internal Revenue included the value of the corpus of the trust in Mrs. James' gross estate and determined a deficiency of tax. The Board of Tax Appeals reversed holding that Section 302 (d) was inapplicable, and its ruling was affirmed by the Circuit Court of Appeals. On certiorari the judgment was reversed by the Supreme Court, by a divided bench.

MR. JUSTICE ROBERTS delivered the majority opin-

ion, in which he stated first that the Circuit Court had ruled as it did, because it thought that the decision in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, required the language of the Act to be construed as tantamount to the words "in conjunction with any person not a beneficiary." Distinguishing the ruling in that case, MR. JUSTICE ROBERTS said:

"The *Reinecke* case involved Section 402 (c) of the Revenue Act of 1921 (substantially Section 302 (c) of the Revenue Act of 1926) which directed the inclusion in the gross estate of all property 'To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . .' It was held that a gift beyond the power of the grantor to alter, amend or revoke could not be said to take effect in possession or enjoyment at or after his death. Conversely, one which he alone held the power to revoke or modify came within the section, since, at his death, substantial interests passed from his control and were for the first time confirmed in others. The case involved nothing more than a determination whether the transfers were complete when made. If they were the statute did not reach them. Here we have a different problem, for Section 302 (d) of the 1926 Act on its face embraces Mrs. James' transfer, although complete when made and thereafter beyond her own unfettered control."

Consideration was then given to the respondent's contention that the section should be construed in the light of the analogous Section 219 (g), relating to the taxation of income from a trust, the corpus of which the grantor reserves power to revest in himself "either alone or in conjunction with any person not a beneficiary." Recognizing that the two sections have a related purpose and that the legislative history lends support to the contention, the Court, nevertheless, thought that the language of the two sections requires a different construction. As to this the opinion states:

"The two sections have a cognate purpose but they exhibit marked differences of substance. The one speaks of a power to be exercised with one not a beneficiary; the other of a power to be exercised with any person. The one refers to a power to revest the corpus in the donor; the other has no such limitation. It is true, the Report of the Ways and Means Committee on Section 302 (d) said 'this provision is in accord with the principle of Section 219 (g) of the bill which taxes to the grantor the income of a revocable trust.' But to credit the assertion that the difference in phraseology is without significance and in both sections Congress meant to express the same thought, would be to disregard the clear intent of the phrase 'any person' employed in Section 302 (d). We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used. The section applies to this transfer."

The effect of the due process clause of the Fifth Amendment was then discussed, and the conclusion reached that, though the transfer was complete when made, nevertheless it is within the power of Congress to bring within the Act a case such as that under review, in order to prevent avoidance of a tax. In exposition of this view MR. JUSTICE ROBERTS said:

"The respondent insists that a power to recall an absolute and complete gift only with the consent of the donee is in truth no power at all; that in such case the so-called exercise of the power is equivalent to a new gift from the donee to the donor. And so it is claimed that the statute arbitrarily declares that to exist which in fact and law is nonexistent. The position is untenable. The purpose of Congress in adding clause (d) to the section as it stood in an earlier act was to prevent avoidance of the tax by the device of joining with the grantor in the exercise of the power of revocation someone whom he believed would comply with his wishes. Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate. Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed."

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER were of opinion that the judgment should be affirmed.

The case was argued by Mr. David E. Hudson for the petitioner, and by Mr. Russell E. Bradford for the respondent.

Taxation—Estate Taxes—Transfers Inter Vivos

Where members of a family transferred to a trustee for their benefit for life, with remainders to their appointees by will, shares of stock in a family corporation upon a trust, and the trust was to terminate and the estate revert to the settlors, among others contingencies, upon delivery to the trustee of a declaration of termination signed by all the beneficiaries, the transfer is not subject to §302 (d) of the Revenue Act of 1926. The power of all the beneficiaries to terminate the trust was present under the law in the absence of the reservation of such power, and is not tantamount to a power of revocation reserved to the settlors, within the meaning of §302 (d).

Helvering v. *Helmholz*, 80 Adv. Op. 5; 56 Sup. Ct. Rep. 68.

This case also presented a question as to the scope of Section 302 (d) of the Revenue Act of 1926. The respondent is the administrator and sole beneficiary of the estate of his wife. In 1918 she, her father and mother and her brothers and sisters joined in an indenture conveying to a trustee all of the shares of stock in the Patrick Cudahy Family Company. Her contribution was 999 shares, the dividends from which the trustee was to receive and pay, less expenses, to Mrs. Helmholz for life, remainder to her appointee by will and remainder to her issue. In the event that she or any other subscriber should die without issue the net dividends on the stock delivered to the trustee by each decedent were to be paid "to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation."

Various events were specified in the trust indenture upon which the trust was to terminate. The provisions of the indenture setting forth such events are quoted in the opinion. Among them were (1) delivery to the trustee of a writing signed by all the beneficiaries stating that the trust shall end; (2) delivery to the trustee of a certified copy of a resolution of the board of directors of the company declaring the trust at an end; (3) dissolution of the company in any manner and for any causes provided by law.

Mrs. Helmholz bequeathed all her property to the respondent, which the state courts held to be a valid appointment under the trust deed. The Commissioner

held that the value of the 999 shares should be included in the gross estate. The Board of Tax Appeals reversed, and its ruling was affirmed by the Court of Appeals for the District of Columbia. On certiorari, the judgment was affirmed by the Supreme Court, in an opinion by Mr. Justice Roberts. In deciding the case, it was noted that under *Helvering* v. *City Bank Farmers Trust Co.*, reviewed above, the transfer was complete upon creation of the trust in 1918. The cases were differentiated by the absence of a reserved power of revocation or alteration, and by the retroactive operation of the Act. After commenting on certain events of termination, Mr. Justice Roberts discussed the petitioner's contention that the clause enabling all the beneficiaries to terminate the trust is equivalent to a reserved power of revocation.

The contention and the Court's view of its validity were stated in the following:

"The petitioner, however, pitches upon the only remaining event of termination, asserting it to be the equivalent of a power to revoke, or to amend, to be exercised by the settlor with others. This is found in the clause providing that the delivery to the trustee of a writing signed by all the then beneficiaries (other than testamentary appointees) declaring such purpose, shall be effective to end the trust. He points out that such a writing might have been executed by Mrs. Helmholz and her co-beneficiaries while she was alive, with the effect of revesting in her the shares which she had delivered into the trust. This argument overlooks the essential difference between a power to revoke, alter or amend, and a condition which the law imposes. The general rule is that all parties in interest may terminate the trust. The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust."

Finally, Section 302 (d) was declared, if applicable, to be in violation of the Fifth Amendment, because of its retroactive operation.

"Another and more serious objection to the application of Section 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. . . If Section 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment."

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO concurred in the result on the ground last stated.

The case was argued by Mr. David E. Hudson for the petitioner, and by Mr. James Quarles for the respondent.

Taxation—Estate Taxes—Transfers Inter Vivos

Where a decedent transferred property inter vivos to a trustee for the benefit of his daughter for her life, with remainder over to certain named persons, and provided that the trustee should have discretionary power to terminate the trust, and further that the trust should terminate if the daughter predeceased the decedent, and that in either event the estate was to revert to him, the transfer was complete when made, and is not taxable as a transfer "intended to take effect in possession or enjoyment at or after" the decedent's death, within the meaning of §302 (c) of the Revenue Act of 1924.

Helvering v. *St. Louis Union Trust Co.*, 80 Adv. Op. 49; 56 Sup. Ct. Rep. 74.

This opinion dealt with a question as to whether a transfer of property *inter vivos* was "intended to take effect in possession or enjoyment at or after" the grantor's death, within the meaning of §302 (c) of the Revenue Act of 1924.

The decedent, several years prior to his death, transferred to a trustee certain securities in trust, the net income to be paid to his daughter during her life, with remainder over to certain named persons. The trustee was given discretionary power to terminate the trust whenever it might deem it wise to do so, whereupon the estate was to revert to the grantor. It was also provided that the estate was to revert to the grantor in the event that his daughter should predecease him. The indenture recited the grantor's intention to make "an absolute and irrevocable gift and settlement of the property . . . so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein." Neither of the two contingencies stated had happened at the time of the grantor's death.

The commissioner assessed a deficiency tax against the estate on the ground that the right reserved to a revestment of the property, upon the happening of either of the contingencies, made the transfer one "intended to take effect in possession or enjoyment at or after" the transferor's death, within the meaning of §302 (c) of the Revenue Act of 1924. The Board of Tax Appeals reversed the commissioner and the Circuit Court of Appeals sustained the Board. On certiorari the judgment was affirmed by the Supreme Court by a divided bench, MR. JUSTICE SUTHERLAND delivering the prevailing opinion.

In discussing the case, the Court pointed out that the event which gives rise to the tax is the *death* of the decedent, with the resulting *transfer* of property, by will or by the laws of intestacy. Section 302 (c) includes certain gifts *inter vivos* upon the theory that they are, in effect, testamentary transfers. *Heiner* v. *Donnan* and *Reinecke* v. *Trust Co.* were then cited and language quoted from them emphasizing that the statute contemplates that an interest in property must pass in consequence of the donor's death, to bring the transfer within the reach of §302 (c).

MR. JUSTICE SUTHERLAND then said:

"If, therefore, no interest in the property involved in a given case pass 'from the possession, enjoyment or control of the donor at his death', there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his death. The grantor here, by the trust instrument, left in himself no power to resume ownership, possession or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. This is well stated by the court below (75 F. (2d) at page 418):

"'It was only in the case of the happening of certain contingencies over which he had no control that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the

trust still continued; and the second was a termination by the trustee of the trust during the lifetime of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime, nothing more than a possibility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert into an impossibility.'

"It is not, in reason, possible to find in the circumstances anything which suggests that the death of the grantor, whenever it might happen, would effect any change, or was intended to effect any change, in the extent or quality of the estates conveyed in trust. The only death which could have had any such effect was that of the daughter, the grantee; and that event did not take place."

MR. JUSTICE STONE delivered a dissenting opinion in which he took the view that the gift was not complete until the grantor's death. In this opinion he said, in part:

"The section, in its scope and purpose, is thus similar to §302 (d) which includes in the decedent's taxable estate the value of his interest held as joint tenant or tenant by the entirety, although created by deed *inter vivos* . . . Both provisions prevent tax evasion by subjecting to the death tax, forms of gifts *inter vivos* which may be resorted to, as a substitute for a will, in making dispositions of property operative at death. . . .

"It seems plain that the gift here was not complete until decedent's death. He did not desire to make a complete gift. He wished to keep the property for himself in case he survived his daughter. He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter. If he had reserved a power to revoke the trust, if he survived her, *Reinecke v. Northern Trust Co., supra,* would have made the gift taxable, as would *Klein v. United States, supra,* if he had reserved a remainder in himself with gift over, if he did not survive his daughter. Instead, by using a different form of words, he attained the same end and has escaped the tax.

"Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form. . . . However we label the device it is but a means by which the gift is rendered incomplete until the donor's death. The extent to which it is incomplete marks the extent of the 'interest' passing at death, which the statute taxes."

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, and MR. JUSTICE CARDOZO concurred in the dissenting opinion.

Becker v. *St. Louis Union Trust Company,* 80 Adv. Op. 54; 56 Sup. Ct. Rep. 78, involved a similar question as to four separate trusts set up for the grantor's children, in which it was provided that the trust estate was to revert to the grantor in the event of the beneficiary's death prior to the grantor's, or should go to the beneficiary absolutely, in the event that the grantor died first. In either event the trust was to terminate. The Court was of the opinion that *Helvering* v. *St. Louis Union Trust Co.*, reviewed above, was controlling as to whether the transfer was intended to take effect in possession or enjoyment at or after the grantor's death. Accordingly, it was held that the transfers were not within §302 (c) of the Revenue Act of 1926.

A further question was whether the transfer was made in contemplation of death. In decision of this question, MR. JUSTICE SUTHERLAND discussed *United States* v. *Wells,* 283 U. S. 102, and reviewed the evidence on the question and the conflicting views of the District Court and the Circuit Court of Appeals. Affirming the ruling of the latter, that the transfer was not shown to be in contemplation of death, MR. JUSTICE SUTHERLAND said:

"In the present case the district court found that the motive of decedent was to decrease his income tax by distributing a portion of his property among the four trusts and, at the same time, to make provision for the distribution of the property to his children at decedent's death, and concluded therefrom that the transfer was made in contemplation of death. The Circuit Court of Appeals reached the opposite conclusion. It found on the evidence that the decedent, in making the trusts, was actuated by two motives—(1) to make his children independent; (2) to avoid high surtaxes on his income; and that both of these motives were associated with life. Evidence that the decedent was in any way influenced in what he did by the thought of death, that court said, was entirely lacking.

"It is true that the decedent at the time of making the trusts was 76 years of age. But the evidence shows clearly that he was in excellent health, attending regularly to business, apparently was not looking forward in any way to his death, came of a very long-lived family, expected to live well beyond the age of 90, and in fact lived seven years after making the trusts. The beneficiaries were all past 21 years of age, and the record shows only that the grantor's objects were to make them allowances in order to get rid of the nuisance of treating them as children, make them independent so they would know what they were to get each year, and, as he had ample income of his own, to avoid the high surtax and make each of his children pay a tax on the independent income received.

"We are unable to find anything in the record which conflicts with the statement of the court below that evidence that decedent was in any way influenced by the thought of death was wholly lacking. The government argues that the finding of the trial court in respect of the matter is the same as that of the commissioner, and that this circumstance gives additional weight to that court's finding. Our attention has not been called to anything in the record which shows that the commissioner's determination rested upon such a finding. The petition alleges that the reason which brought about the commissioner's determination was that the transfer was one which 'did not take effect in possession or enjoyment until at or after the death of the decedent,' and that he so advised the respondents by letters. The answer affirmatively alleges that the commissioner's reasons were 'that there had been no transfer of such property during the lifetime of the decedent; that such property was transferred at and as a result of the death of the decedent; and that such transfer was intended to take effect at or after the death of the decedent', and that the commissioner advised respondents accordingly. We are unable to find anything in the record which justifies the conclusion that the commissioner specifically determined that the transfers were made in contemplation of death, or, indeed, that there was any evidence before him on that subject."

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE CARDOZO dissented on the grounds stated in their dissent in *Helvering* v. *St. Louis Union Trust Co.*

Helvering v. *St. Louis Union Trust Co.* case was argued by Mr. David E. Hudson for the petitioner, and by Mr. Daniel N. Kirby for the respondent.

Becker v. *St. Louis Union Trust Co.* was argued by Mr. David E. Hudson for the petitioner, and by Mr. Crawford Johnson for the respondents.

State Statutes—Police Power—Power to Prescribe Standard Containers for Horticultural Products

It is within the police power of a state to prescribe the size and shape of containers used in marketing strawberries and raspberries, as a means of making effective regulations

made to preserve the condition of the products, and to protect buyers from deception.

Pacific States Box & Basket Co. v. *White*, 80 Adv. Op. 158; 56 Sup. Ct. Rep. —.

This appeal presented to the Supreme Court a question as to the validity of an order of the Department of Agriculture of the State of Oregon, prescribing, among other things, the size and shape of containers for strawberries and raspberries. The appellant, a California corporation, brought suit in a federal district court in Oregon for an injunction against the enforcement of the order.

The order was adopted under statutory authority "in order to promote, protect, further and develop the horticultural interests" of the State. The statutes make it unlawful for anyone to pack for sale or transport for sale, or sell, the article in a container, unless it conforms to the standard fixed, and penalties are prescribed for violations.

The order challenged prescribed the dimensions of hallocks for strawberries and raspberries.

"A hallock is a type of rectangular till box with perpendicular sides and a raised bottom. It is usually made of rotary cut veneer, taken directly from spruce logs; but is sometimes made of paper or other material."

The plaintiff is the manufacturer of a type of containers different from hallocks. The plaintiff's container is thus described:

"Its type, which is also used for raspberries and strawberries, is known as tin-top or metal rim. It differs from the hallock both in shape and construction. In shape, it is more like a cup; its sides slope outward; and it has not the raised bottom. This cup is made from two thin strips of wood crossing each other to form the bottom of the container and then bent upward to form the sides, reinforced with a narrow metal strip to insure protection of the cup and its contents, as well as to insure uniformity of cubic measure. The plaintiff has for years sold a part of its product of tin-top cups to dealers in Oregon, for ultimate use as containers for raspberries and strawberries to be packed there."

The order was challenged on the ground that its necessary effect is to exclude the plaintiff's containers from use in Oregon. It was claimed, therefore, that the order violates the due process clause of the Fourteenth Amendment, because it is arbitrary and capricious and not reasonably necessary for the accomplishment of any legitimate purpose of the police power; that it violates the equal protection clause of that Amendment, because it grants a monopoly to manufacturers of hallocks; and that it violates the commerce clause, because it imposes undue burdens on interstate commerce.

The district court denied an injunction and sustained the order. On appeal the decree was affirmed by the Supreme Court, in an opinion by MR. JUSTICE BRANDEIS.

Considering first the contention that the order violates due process, the Court pointed out that it was conceded that one of the earliest exertions of the police power has been the regulation of trade to preserve the condition of merchandise, to protect buyers from deception, and to prevent unfair competition. It was also observed that the plaintiff did not challenge the reasonableness of the standard so far as it prescribes the capacity of the box or basket, but directed its challenge solely to the fixing of the dimensions and the form of the container.

In rejecting this ground for the claim of violation of due process, MR. JUSTICE BRANDEIS said:

"But to fix both the dimensions and the form may be deemed necessary in order to assure observance of the prescribed capacity and to effect other purposes of the regulation. It may be that in Oregon, where hallocks have long been in general use, buyers at retail are less likely to be deceived by dealers as to the condition and quantity of these berries if they are sold in containers of the prescribed form and dimensions. It is said that there are 34 other styles or shapes of berry basket in use somewhere in the United States. Obviously, a multitude of shapes and sizes of packages tends to confuse the buyer. Furthermore, the character of the container may be an important factor in preserving the condition of raspberries and strawberries, which are not only perishable but tender. A shallow container, like the hallock prescribed, may conceivably better preserve these fruits than the deeper cup which the plaintiff manufactures. A container with perpendicular sides, like the hallock, may conceivably preserve them better than a metal-rim cup with outward sloping sides. And, since the containers are to be packed and shipped in crates of 24, the berries may conceivably be better stowed where the fruit basket has the bottom set-up peculiar to the hallock, than if it had the flat bottom of the plaintiff's metal-rim cup. Considerations of this nature led the Colonies, the individual States, and Congress to prescribe for many articles not only the capacity, but the size and form of containers.

"Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted."

The contention that the order grants a monopoly to manufacturers of hallocks was thought unfounded, since the plaintiff and all others were free to engage in the manufacture of hallocks. The Court added, as to this contention that "the grant of a monopoly, if otherwise an appropriate exercise of the police power, is not void as denying equal protection of the law."

The contention that the order is an undue burden on interstate commerce was also considered and rejected. In this connection the Court pointed out that,

"The prohibition of other types involved in prescribing the standard is non-discriminatory. It applies regardless of the origin of the containers. The plaintiff is a manufacturer of containers, not a packer or shipper of berries. It is not prohibited from shipping its tin-top containers into Oregon; nor from selling them there. The operation of the order is intrastate, beginning after the interstate movement of the containers has ceased, and after the original package has been broken. To sustain this contention of the plaintiff would be to hold that its containers, because of their origin, are entitled to immunity from the exercise of the state regulatory power."

After commenting on the presumption of constitutionality of legislation, the Court adverted to a distinction urged by the plaintiff as to the existence of such presumption in the case of an administrative regulation. The claim was that, though a rebuttable presumption exists in support of legislative acts, no such presumption exists in support of a regulatory act of an administrative body. This distinction was rejected as without support in either reason or authority.

"The contention is without support in authority or reason, and rests upon misconception. Every exertion of

(*Continued on page* 822)

COMMENT ON TRIALS OF FACT IN CONSTITUTIONAL CASES

Experiences at a Time When the Method of Proof of Fact to Excite Judicial Notice Was Highly Unsatisfactory—Gradually the Practitioner Has Had His Work of Rebutting or Sustaining the Presumption of Constitutionality More Definitely Outlined—Problem of Determining What Particular Facts of a Given Trade or Industry Are Inside or Outside the Sphere of Judicial Notice — Recent Railway Pension Case*

By Hon. William Denman
Judge of U. S. Circuit Court of Appeals, Ninth Circuit

IT WAS with great pleasure that I accepted the invitation of my elder brother Soper to come down from the city of California's ancient culture to the southern provinces of the state to join in extending a welcome to you in this tropical and expansive metropolitan area. Some fourteen speakers at the various sectional meetings have surprised you by a comparison of its aspiring thermometer with the warmth and expansiveness of Los Angeles hospitality. San Franciscans agree about its warmth. Its envious literati, reading their Pirandello in the cool breezes of the Golden Gate, admit its geographical expansiveness. They describe it as "six suburbs in search of a city." Such alliterative depreciation is, however, a matter of local concern and not within the cognizance of this national association.

There was a rather compelling suggestion in that invitation that the speakers should be in a reminiscent mood and tell something of their professional experiences which might be of interest to their visiting brethren.

I shall venture, therefore, to reminisce about and make certain suggestions concerning the problems facing the profession in trials of constitutional questions of fact. That is to say, in those cases where our judicial conscience is to determine the constitutionality of a statute, on what Dean Pound describes as our mental picture of the facts of our social order, which the statute seeks to regulate. It is the occasion when the lawyer addresses himself to the task described by Justice Field in the "Montello" (11 Wall, 411, 415) as rendering "the fiction of the law as to our supposed knowledge . . . a reality in the case."

Probably in no state in the Union was the so-called "Bull Moose" movement more productive of regulatory legislation than during the administration of Hiram Johnson as Governor of California. Known up to that time as an able advocate and politician, Johnson as Governor administered the regulatory features of his nineteen odd reforms through boards made up in considerable part of younger college graduates, rather than the usual political job holders. Once his energies were turned from the campaign to the governorship, he was transformed from the orator into the administrator. His insistence that his boards should afford the widest exploration of facts on which their decisions should be based and his judicial temper in his appraisal of facts where his own discretion was to be exercised, commanded the respect of the attorneys representing the great interests subject to his control. Johnson taught the state how to take administrative notice which is, in essence, not different from judicial notice on regulatory questions. It is safe to say none of the conservatives who fought his program of a quarter of a century ago would now ask for the repeal of any of his regulatory statutes.

I had supported Johnson in his campaign and had something to do with framing some of the laws but opposed him, with painful ineffectiveness, on his recall of judges. Very frankly, I was pleased when he asked me to assume charge of the appeals in two of the later and minor cases involving the constitutionality of state laws controlling women's hours of labor. (Miller v. Wilson, 236 U. S. 373; Bosley v. McLaughlin, 236 U. S. 385.)

The cases arose on the employment of a waitress in one, and a student hospital nurse in the other, for more than the statutory eight-hour limit. Johnson laughingly remarked that my labors would be light because I would be assisted by a committee of five from the Waitress' Union. The litigation proved to be an easy task, but for an entirely different reason.

The waitress case was on a habeas corpus in the California Supreme Court on a misdemeanor conviction. No evidence on the constitutional question was taken below. In the student nurse case, evidence was offered to support the bill for an injunction against enforcement, but it was refused on the ground the bill stated no cause of action.

The rule governing the factual matters offered in such cases was plain. Its strongest statement has come from the Supreme Court, speaking then through the opinion of Mr. Justice Van Devanter and later Mr. Justice Sutherland. I am sure that those two Southern Californians, Messrs. Sinclair and Townsend, would say of neither of these great lawyers that he was lacking in that one of the organic principles governing human progress, which requires an appreciation of the necessity of conserving established institutions against the disorder and chaos of ill-considered change.

In 1910, Mr. Justice Van Devanter's opinion in Lindsley v. Natural Carbonic Gas Co. (220 U. S. 61, 78) stated concerning a challenged statute that:

"**. . . if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.**"

In 1922 Mr. Justice Sutherland says, in Adkins v. Children's Hospital (261 U. S. 525, 544):

"**This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in fa-**

*Address delivered before the meeting of the Judicial Section of the American Bar Association at Los Angeles, 1935.

vor of the validity of an act of Congress until overcome beyond rational doubt."

But the rule, as stated when our two cases were tried, gave no indication of the method of overcoming the presumption. There was no suggestion, either in the Supreme Court of the United States or the California tribunal, that they should be sent back to the lower court for a trial of the scientific questions of fact, chiefly of functional physiology. We pursued the practice generally prevailing, offering in the briefs the facts relating to the effects of industrial employment on women's health. My work had been already largely performed in the brief of Mr. Brandeis in Muller v. Oregon (208 U. S. 412), the woman's ten-hour law case, and the accompanying review of conditions of women in industry by Miss Goldmark. That collation of statistics and arguments, you may remember, covered a very wide field and it was with a not entirely cordial irony that an old friend, who was opposing me in the cases, said: "Billy, I can recognize everything your brief stole from Miss Goldmark, but where did they find the old kitchen stove?"

In the Johnson reform movement, we had had considerable experience with the treatises of a certain type of reformer who sees only those facts which support his dream and has the literary power to write them in a form which seems final and convincing. As I read over the summaries and opinions offered in those cases to awaken or stimulate the court's judicial consciousness, I wondered what would happen to some of the writers if they were subject to the cross-examination of a trained mind in the subjects they were discussing. How would they survive on the witness stand, or in the consultation room of a great trust company, whose practical economist was determining the propriety of a loan on the basis of the facts and conclusions of the enthusiastic reformer? This is not drawing an invidious distinction. I would rather accept both the factual matter and the conclusions of many of the social workers and social science writers offered by Miss Goldmark, than I would those of some similar treatises and factual presentations by masters of industry which I have had occasion to support or oppose in my practice before the committees of the Recovery Administration.

I believe the great body of the profession will agree with me that, at that time, the method of proof of fact to excite judicial notice in constitutional questions was highly unsatisfactory, both from the standpoint of common law trial processes and from the standpoint of the importance of the issues involved.

In the hearing in the California Supreme Court I was attended by my committee of five from the Waitress' Union. The argument was technical and these good ladies could not possibly have followed its intricacies, but in the hall afterwards they expressed great enthusiasm and praise of the presentation. They concluded, however, with these words, "And now, Mr. Denman, we want the names and addresses of all the wives of the justices, because we are going to call on them tonight." It took strong persuasion to convince them that here at least was one way in which it was not permitted to excite the judicial apprehension. When I told one of my opponents of this proposed contemptuous procedure, he ironically suggested that it was just as appropriate an appeal to the judges' consciences as the character of evidence we were offering.

Gradually the practitioner has had his work of rebutting or sustaining the presumption of constitutionality more definitely outlined. There is still left to him the method of pure reasoning as to the legislative declaration and purpose and as to the terms of the act itself. He may cite the decision of the State Supreme Court on a state statute, as a persuasive finding of fact. He may still offer his treatises and statistics accompanying his brief, but it may be, as suggested in the Adkins minimum wage case, that the court's independent reading is more persuasive. In many cases, however, it is no longer safe to rely on such a presentation, and in some the Supreme Court will not permit it.

In 1924, in the Chastleton case (264 U. S. 543, 548) the Supreme Court reversed the dismissal of the bill to restrain enforcement of the statutes controlling rents in the District of Columbia, and says:

"That the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law, and if the question were only whether the statute is in force today, upon facts that we judicially know we should be compelled to say that the law has ceased to operate. Here however, it is material to know the condition of Washington at different dates in the past. Obviously the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here. The evidence should be preserved so that if necessary it can be considered by this court."

That case does not reappear in the Supreme Court and we do not know whether such facts, if ascertained and weighed would have been classified as under the older concept of informing judicial notice or whether there is a limitation by the record in such areas of fact in constitutional causes.

Through a series of cases in the next ten years (O'Gorman & Young v. Hartford Ins. Co., 282 U. S. 251; Tax Commissioners v. Jackson, 283 U. S. 527, 533; Insurance Co. v. Glidden Co., 284 U. S. 151, 158; Boston & Maine R. Co. v. Armburg, 285 U. S. 234, 240; Borden's Co. v. Baldwin, 293 U. S. 194, 209) the classification of facts to rebut or support the presumption had become more definite. In the Borden milk case (Borden's Co. v. Baldwin, 293, U. S. 194, 209) the opinion first distinguishes between fanciful conjecture and a reasonable concept which, through judicial notice, will repel the attack on a statute not arbitrary on its face. Continuing, the Chief Justice then states:

"But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence so that conclusions shall not be reached without adequate factual support."

Having his way cleared thus far, the practitioner nevertheless must now determine what are the particular economic facts of a given trade or industry which are inside, and those which are "outside the sphere of judicial notice." From a careful study of the recent case of the Railway Retirement Board v. Alton Railroad Co. (decided May 6, 1935), the railway pension case, there can be no question that, in the advocate's presentation of his facts, every doubt should be resolved in favor of the assumption that they are outside judicial notice.

That case first decides that certain classifications of the workmen to receive the pension and the method

of its computation are so arbitrary that the whole act must fall. The decision does not stop there. It finds as a matter of economic fact that the minds of railroad men are so constituted that unless a pension rests on the uncertain largess of the corporation, it will not add to the efficiency of service in the carriage of passengers or merchandise. It finds that, since the provision is created by Congress, it is congressional largess and, because it is certain, railroad men will feel no increased loyalty to the service of the citizens whom Congress represents. The court concludes the pension measure cannot result in any increase in efficiency of service, and hence is a mere social betterment project paid for by an arbitrary and uncompensated appropriation of the company's funds.

No one will dispute that because the fact found is a psychological condition in the mind of the employee, it is, for that reason, any less an economic fact. Industrial managers have long since learned that the difference between loyalty and disloyalty in the minds of workmen may mean the difference between red and black ink, or large profits and small on the company's books. The court's decision rests entirely upon a factual consideration of the psychology of loyalty.

When the practitioner reads the record in that case, he will discover that the finding is completely supported by the evidence. No loyalty other than employer loyalty with its blending of hope of largess and fear of its loss is proved in the record. Nor do the briefs suggest any other concept of loyalty to the judicial notice of the Court.

But the pension decision after all rests on this mere finding of fact and in a subsequent case the practitioner may conceivably offer other facts to support a similar statute involving the same issue of loyalty. Remembering my brother's indulgence to reminisce, my own experience indicates that there are other facts concerning loyalty in an industry in relevant respects not unlike railroading.

For six years after the war I left my practice and was given control of one of the more extensive lumber concerns in Oregon and California. There were five divisions in the work. In the woods where we logged we had a long-sustained fight with the I. W. W., the predecessors of the Communists, whom we finally eliminated from our camps. On our sixty miles of railway, our men, though not members, had the railway unions' concept of their rights. In the mills we had the four L's with a combined employee-owner committee advising on mill conditions. In our fleet of vessels carrying our lumber to California every man was a member of one of the maritime unions. In our remanufacturing and distributing yard in upper San Francisco Bay we had open shop.

The six years gave me a rare opportunity to study various systems of labor control. First as receiver, and later, after the stockholders regained control, as chairman of the board, I had the absolute power to hire and fire every employee. From the standpoint of employer loyalty I was the employer—in the beginning as the alter ego of the Court and later of the corporation. In the current idiom of masters of industry, the 2,000 men were *my* men. Whatever largess there was to grant, improved quarters, better food, shorter hours, bestowing a job, or higher wages, it was mine to determine. Of course, this was largely done through the superintendents of the different divisions. But I lived most of the time with my outfit and the men knew where the power lay.

I very soon learned that with loggers and lumbermen, loyalty to the employing company was a minor creative factor in woods' and mills' output. It is true that with the poorer workman, the fear of discharge was a necessary part in maintaining efficiency, but no such organization can be successfully run on the discipline necessary for the lesser efficient. With the great body of our men, those we wanted to keep, there was an entirely different kind of loyalty. It was loyalty to the enterprise of which each of them felt he was a living, organic part. It was a loyalty to a fellowship in creation. The fallers, buckers and donkey-engineers in the woods, the railroad engineers and brakemen, the head sawers, the edgermen, the trimmers and filers in the mill and seamen on the ships and, even the salesmen, know no loyalty to the boss at all, except as he was felt to be in personal sympathy with their creative effort. If not, they had an inner contempt for him.

You can say what you please about a judge's detachment of mind, such an impression as created by those six years in contact with this group of workmen, is bound to affect his judicial apprehension. And, I submit, he will be influenced by it as justifiably as by the unnamed treatises which the Court in the Adkins decision stated had overcome those offered by counsel. All the more reason why, in these constitutional cases, the advocate should extend his trial and by question and answer explore the minds of the writers of treatises and collectors of statistics for every concept that may have even a remote effect on the judge's preconceptions.

Such trials should go much further than the mere filing of affidavits as in the pension case. On such subjects we should be regarded as that justice of the peace, of whom the old town lawyer said, "Sure I talked to him half a day. You never know what the crazy fool is thinking about."

Now, it may just possibly be that something like this is the real essence of the railroad man's loyalty. That it is a loyalty to organized creative effort. It is also conceivable that Congress might pass another pension bill unobjectionable in its classifications, in which such elements of loyalty might be expressed in a legislative finding in the statute somewhat as follows:

"That the men of our interstate railway system perform its major organic function of service to the public in transportation of its citizens and their merchandise. That outside the personnel administering the state and federal governments their service is the most important to the material interest of the American people. That it is one of the last of the great employments in which the direction of mechanical forces of high power lies in the individual judgment of the worker. That this judgment is to be exercised both in the face of sudden emergency and with resistance to the dulling effect of sustained nerve-straining responsibility born in the monotony of years of repetition of the same task. That experience has shown that men's participancy in railroading produces a strong loyalty to the organization of which they are creative parts. That it is a loyalty of men of character devoted primarily to the service to which their minds and bodies are given; and that their loyalty to their employer *as employer* is subordinated to the loyalty to the organization as an all-embracing entity. That loyalty to the employer disappears once railroad men feel that he is not of them. That employee loyalty to the distant corporate president or banker-controlled board of directors is practically non-existent. That one of the primary inducements *to draw men of the required high character into such an organization and keep them*

there is the certainty that it, the living entity to which they belong, will afford them and their dependents a secure old age. That to a man of such required character, a pension giving such security has a stronger appeal to his loyalty to his service, if it is a certain internal function of the organization, than if it rests in the uncertain and insecure largess of the employer. That the employers' power to suspend and discharge is a sufficient provision for the elimination of the inefficient and the incompetent; that the removal of the implement of the employer largess pension will tend to improve railway management, by aiding in eliminating an employing class which depends for the efficiency of its workmen on possible largess and the fear of its loss, instead of keeping alive the inspiration of loyalty to an organization of service."

Don't misunderstand me. It is not our purpose to determine the truth of the pessimists' view that the American railroad man is not primarily moved by the considerations so expressed in the possible new legislation. It is conceivable that such a concept of the loyalty of American workmen is one of the "fanciful conjectures" to which the Chief Justice refers in the Borden Milk case. Much less should it be suggested that the majority of the court has so held. On the contrary, trying the case as they did, *on the record*, such a motivation was not proved.

In defending such a second pension law, the advocate may argue, possibly with success, that since there is a different retirement board, the parties are not the same and hence res judicata does not apply; and since he is invoking no different rule for determining the constitutionality of such legislation, he is not seeking to overrule any established principle of law, and hence does not violate stare decisis.

His witnesses might be locomotive engineers and brakemen, bridge workers, wrecking crews, truck and tower men, each of whom was stirred by a stronger passion of loyalty than to the corporation officers. They might offset the testimony of these great officials who felt that only by their largess could men's loyalty be inspired.

At any rate, if this review of the later authorities be correct, our practitioners must now provide a definite and extended record if they would safely attack or defend the constitutionality of a statute with facts concerning the organization of industry.

CAN SCIENCE LEGALLY GET THE CONFESSION?

BY THOMAS F. GREEN
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IMPROVED law enforcement is one of the major objectives of the American Bar Association this year.[1] For several years the Association has displayed interest in this subject. At the 1931 meeting Mr. Justin Miller after offering a resolution said, "This resolution is particularly interesting because it illustrates the fact that the problem of crime involves not merely society's struggle to capture and convict the guilty, but also to protect the innocent."[2] The Association adopted[3] the resolution which included two paragraphs as follows:

VI. That the extortion of confessions or admissions, by depriving the prisoner of opportunity to sleep, depriving him of food or drink, or by any of the methods of the so-called "third degree", is abhorrent to all who value the dearly purchased liberties declared in our Constitution, and is indefensible upon any ground.

VII. That all enforcement officers and judges ought to be alert to protect arrested persons in their constitutional rights and ought never to take part in or to countenance any attempt by secret inquisition or other lawless means to get confessions or admissions.

Judge Marsh of Detroit speaking before the Association's Section on Criminal Law in 1933 said:[4]

1. The Procuring of So-Called Confessions by Punishment.—Confessions procured by physical violence or other means of torture are only evidence of police inefficiency. Such confessions usually fail in court and future efforts of the police are rendered more difficult, if not futile, with the result that the accused, even though guilty, frequently escapes.

The previous year the Association had passed the following resolution:[5]

Resolved, That the American Bar Association commends to police and law enforcement agencies the use, so far as possible within present legal limits, of modern scientific methods such as are being developed by Scientific Crime Detection Laboratories, as tending to replace certain methods, sometimes referred to as the "third degree."

The possibilities existing under "present legal limits" are narrowed by a line of decisions[6] to the effect that evidence of the mechanical results of "lie detector" tests cannot yet be received and that these results cannot be the basis of expert testimony.

The reason given in these cases for excluding the evidence is that the test is still in the experimental stage. A number of scientists have doubted the dependability of the results.[7] The method, which involves measuring changes in respiration and systolic blood pressure during questioning, is described in C. T. McCormic's "Deception Tests and the Law of Evidence."[8]

If it be conceded that in the present state of the authorities the immediate results of the lie-detector tests cannot be received in evidence there remain two possible fields of usefulness for the apparatus. First, it may uncover important clues that will lead to the obtaining of legal evidence or that will convince the investigators of the guilt or innocence of the suspect and thus narrow the investigation. Second, it may bring about a confession—the suspect, convinced after watching the machine record his reactions that his questioners

1. 59 Am. Bar Assoc. Rep. 278, 283; 21 Am. Bar Assoc. Journal 470, August, 1935.
2. 56 Am. Bar Assoc. Rep. 29.
3. 56 Am. Bar Assoc. Rep. 127, 309.
4. 58 Am. Bar Assoc. Rep. 538.
5. 57 Am. Bar Assoc. Rep. 65.
6. Frye v. U.S. 54 D.C. Apps. 46, 293 Fed. 1013 (1923); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933).
7. The Berkeley Lie Detector and Other Deception Tests, by John A. Larsen, 47 Am. Bar Assoc. Rep. 619, 628 (1922); 37 Harv. L. Rev. 1138 (1924); 24 Col. L. Rev. 428 (1924) quoting Poffenlerger.
8. 15 Cal. L. Rev. 784 (1927). See quotation from Keeler in Wigmore (2d Ed) 1934 Supplement page 440, and Larsen, op. cit. supra note 7.

know he is lying, confesses. A popular magazine[9] has recently urged the use of lie detectors and other scientific devices to get confessions instead of the usual "third degree" methods. The author of this suggestion seems to take for granted that a confession obtained as a result of the use of a lie detector is admissible evidence. Is such an assumption well founded? Apparently no decisions on the point have been reported. How stands the case on principle?

The Federal Constitution and the Constitutions of practically all the States[10] contain provisions to the effect that a person shall not be required to be a witness against himself. Do those provisions exclude such a confession? Dean Wigmore's view[11] is that the privilege against self-incrimination covers only statements made in court under process as a witness. A number of courts however disagree with the learned writer. In Bram v. United States[12] Mr. Justice White said, "In criminal trials in the courts of the United States wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

It is obvious that criminals who have anything to conceal will learn to refuse to submit voluntarily to these tests. In the absence of a statute requiring a suspect to submit to the test a giving of the test by means of force will be as illegal as the use of the "third degree." The constitutionality of such a statute is therefore one of the questions facing proponents of lie-detector examinations. There are many decisions[13] holding that evidence is inadmissible in a criminal case which is obtained as a result of forcing the accused to submit to physical examination or to make experiments with his person such as putting his foot in a track. The reason such evidence is inadmissible is that it is obtained by compelling the accused to incriminate himself. In jurisdictions where this interpretation is placed on the privilege against self-crimination a statute which would induce him to give evidence against himself by forcing him to submit to a lie detector test would probably be unconstitutional. This would seem to follow whether the evidence offered was the chart of the subject's physiological reaction or an oral or written statement of guilt which would not have been given except as a result of having been forced to take the test. It has been held in a physical examination case that a failure to object (silence) does not amount to consent to the examination.[14]

Is it desirable that the privilege be applied to lie-detector confessions? According to Wigmore the real reasons for the existence of the privilege are the danger of tyrannical or dishonest misuse of the power by the official having authority to examine, and the danger that the prosecution will be satisfied with an incomplete investigation and rely mainly upon inducing the accused to disclose the desired information.[15] These objections apply with equal force to examination under oath by a committing magistrate and examination by a lie detector expert.[16] If you give the police officer, or other official, authority to conduct these examinations and tests you have sown the seeds from which may possibly develop the very inquisition from which the privilege was and is intended to protect us.

Aside from the constitutional privilege against self-incrimination lie-detector confessions may be excluded on the ground that they are not voluntary and therefore violate a rule of evidence. In Ziang Sung Wan v. United States,[17] the Supreme Court said:

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made . . . a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion and whether the compulsion was applied in a judicial proceeding or otherwise."

Some state courts have gone even further, holding that a statement to the prisoner—"you had better tell the truth"[18] or "you had better confess"[19] makes a confession which follows inadmissible. Some of the earlier English cases seem to go as far as to hold a confession involuntary when the prisoner is told the equivalent of "you may as well confess, we know you did it."[20] This is exactly what the lie-detector test is intended to impress upon the mind of the accused.

Of course the present article is not intended to suggest that the cases cited are necessarily sound or represent the weight of authority. However, if they are applied by analogy to lie-detector confessions they will in some jurisdictions present serious obstacles to the suggested reform of the third degree.

9. Science Gets the Confession, The Forum for January, 1935, page 15.

10. Wigmore on Evidence (2d. Ed.) Sec. 2252. The only two Constitutions mentioned as not containing such a provision are Iowa and New Jersey. The privilege is nevertheless recognized in those two states. See note 13 below.

11. Wigmore on Evidence (2d Ed) Sec. 2266.

12. 168 U.S. 532, 18 S. Ct. 183, 43 L. Ed. 568 (1897).

13. The following citations do not include cases of examination and experiment in court as the question under discussion is: Can the accused be forced to submit to an examination or experiment out of Court?

These cases say that he cannot: Cooper v. State, 86 Ala. 610, 6 So. 110 (1888); Davis v. State 131 Ala. 10, 31 So. 569 (1902); Day v. State, 63 Ga. 669 (1880); State v. Height, 117 Ia. 650, 91 N.W. 935, 94 Am. S. R. 323, 59 L.R.A. 437 (1902). State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909); State v. Horton, 247 Mo. 657, 153 S.W. 1051 (1913); State v. Matsinger, 180 S.W. 856 (Mo. 1915); State v. Cerciello, 86 N.J. L. 309, 90 Atl. 1112 (1914); People v. McCoy, 45 How. Pr. 216 (N. Y. 1873); Bethel v. State, 178 Ark. 277, 10 S.W. 2d, 370 (1928); People v. Scott 326 Ill. 327, 157 N.E. 247 (1927); People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928); People v. Cammarato, 257 Mich. 60, 240 N.W. 14 (1932); State v. Griffin, 129 S.C. 300, 124 S.E. 81 (1924). Jones in his standard work on evidence approves the view that the results of compulsory physical examinations should not be admitted. Vol. 3, page 2537, Sec. 1391.

14. State v. Horton, 247 Mo. 657, 153 S.W. 1051 (1913). See also State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909); State v. Matsinger, 180 S.W. 856 (Mo. 1915)

15. Sec. 2251 Vol. 4 (2d Ed) page 822.

16. Accord 37 Harv. L. R. 1138.

17. 266 U.S. 1, 45 S. Ct. 1, 69 L. Ed. 131 (1925).

18. Wigmore, Evidence (2d Ed) Sec. 833 fn 1.

19. Id. Sec. 838 fn 1.

20. Rex v. Mills, 6 C. & P. 146; Csegina v. Fleming, 1 Armstr. Macartn. & Ogle. R. 330.

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

The St. Ives Memorial Window Design

THE accompanying design represents the handsome memorial window that is to be placed in the Cathedral of Tréguier, Brittany,—the home-town of Ivo, judge and lawyer of six centuries ago, who by his blameless and sacrificial life and his whole-souled devotion to the cause of Justice, gained the admiration of the world of his day and became recognized as the ideal and thus the patron saint of the legal profession.

This design was made by M. Lardeur, a master-glass-maker for the French Department of Fine Arts, and has been approved by the Abbé Lainé, canon of the cathedral, and by the American sub-committee in Paris, consisting of Messrs. Pendleton Beckley, Joseph DuVivier, and Henry S. Bacon. Abbé Lainé, who is deeply interested in the project, was interpreter on the chaplain-staff of the Seventh Regiment in the American Expeditionary Force in 1917-1918, and was wounded in the Argonne.

The design is now pending the final approval of the American Committee, consisting of Messrs. Guthrie of New York, Olney of California, Thompson of Missouri, Denechaud of Louisiana, Brossard and Murphy of Wisconsin, and Clark and Wigmore (chairman) of Illinois.

The lower panel carries the arms of the United States and an inscription (which will be legibly large, for the window is some 25 feet high) reading: "Presented by the Bar of the United States in homage to Ives, patron saint of lawyers."

In the upper panel St. Ives as judge holds a scroll inscribed with a petition, and on his left and right stand a rich man and a poor man, symbolizing the judge's resolve to do justice for rich and for poor alike. "Decretum" is the title of the book of Canon law, administered by him. In the panel above is Moses, holding the Tables of the Law, and St. George, holding the scales of justice.

The full story of the life of Ivo was told in this JOURNAL, Vol. XVIII, No. 3, March 1932, p. 157; and in the same JOURNAL, Vol. XVIII, No. 12, December 1932, p. 794, is an account of a visit to the tomb of St. Ives by a committee of American lawyers after the International Congress of Comparative Law at The Hague. It was out of that visit that the present plan evolved of placing in the Cathedral a memorial window typifying for the American Bar its recognition of the ideal of the lawyer's profession. Other national Bars will doubtless follow this example.

It is hoped that every one of our States will be represented in subscriptions to the fund of $1,200 that is now on its way to completion.

JOHN H. WIGMORE.

CONSTITUTIONALITY OF THE SECURITIES EXCHANGE ACT OF 1934

Commerce Clause and Federal Control over the Mails Apparently Regarded by Congress as the Constitutional Source of Power for Such an Enactment—Act Does not Seem Sustainable under Either, but Federal Regulation of Security Exchanges Can Probably Be Sustained under Power to Regulate Intra-State Businesses Which Directly Affect Interstate Commerce—Doubtful Validity of Some Provisions, etc.

By MILWARD W. MARTIN
Member of the New York Bar

IS the buying and selling of securities on exchanges and over-the-counter markets a lawful field for Federal regulation? Has the Congress power to regulate the New York Stock Exchange and other securities markets of the nation?

By the Securities Exchange Act of 1934[1] this long agitated question[2] is now definitely presented.

By that Act the Congress closes the mails and the channels of interstate commerce to transactions on securities exchanges and over-the-counter markets that do not voluntarily submit to Federal regulation. Brokers and dealers are prohibited from using the facilities[3] of any securities exchange or market, by means of the mails or the instrumentalities of interstate commerce, unless the exchange is registered under the Act or the market's activities are conformed to regulations of the Securities and Exchange Commission.

The constitutional source of Federal power for such an enactment was apparently deemed by the Congress to be found in the commerce clause and the Federal power over the mails. True, in its preamble the Act refers broadly to the effect of securities transactions on the national credit, on the Federal taxing power, and on the national banking system; but it was on the commerce clause and the postal power that congressional reliance for constitutional support seems really to have rested. For the Act does not impose regulation directly on the exchanges; it merely forbids brokers and dealers to use the facilities of an un-registered exchange by means of the mails or the instrumentalities of interstate commerce. If the mails and the instrumentalities of interstate commerce are not used, much of the Act is inapplicable.

Do the commerce clause and the power to control the mails empower the Congress to condition the use of the mails and the channels of interstate commerce on compliance with Federal regulation? May the Congress thus close the mails and the channels of interstate commerce to security transactions on exchanges that do not register? Or is this congressional attempt to bring the securities markets under Federal control unconstitutional?

It would seem that the constitutionality of the Act must be sustained, if at all, on the theory either that the Congress is exercising its well-established power to close the mails and the channels of interstate commerce to transactions inherently harmful, or that transactions on securities exchanges are interstate commerce hence subject to Federal regulation, or that transactions on the important exchanges so directly affect interstate commerce as to come within the congressional power to regulate.

I

It has long been established that the Congress has power to close the mails and the channels of interstate commerce to matter and transactions inherently harmful.

The present Act, however, cannot be sustained under that power.

(a) *Closing the channels of interstate commerce.*

In a certain limited field the power of the Congress to close the channels of interstate commerce is absolute. Any matter that is inherently harmful or immoral, so that its passage in commerce would tend to spread evil from the state of origin to other states, may be barred from interstate commerce by Federal statute.

Thus, Federal statutes have been held constitutional that excluded from interstate commerce lottery tickets[4], impure food[5], women for immoral purposes[6], liquor in contravention of state laws[7], misbranded articles of food[8], stolen automobiles[9], and diseased cattle[10].

As a statement of the subjects involved indicates, however, the Federal power of exclusion in those cases arose not from general power in the Congress to exclude matter from interstate commerce, but from the inherently harmful or dangerous character of the particular subjects excluded[11]. It is a power akin to the police

1. 15 U. S. C. A. 78-A.

2. The passage of the present Act followed more than two decades of intermittent agitation for such legislation. For an outline of the history of the movement, see *Lippmann*, "The Securities Exchange Act of 1934 and the Commerce Clause," 69 U. S. L. Rev. 18.

3. "Facility" is defined by the Act as including the exchange's "premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service."

4. *Lottery Case*, 188 U. S. 321 (1903).

5. *Hipolite Egg Co. v. U. S.*, 220 U. S. 45 (1911).

6. *Hoke v. U. S.*, 227 U. S. 308 (1913); *Caminetti v. U. S.*, 242 U. S. 470 (1917).

7. *Clark Distilling Co. v. West. Md. Ry. Co.*, 242 U. S. 311 (1917).

8. *Weeks v. U. S.*, 245 U. S. 618 (1918).

9. *Brooks v. U. S.*, 267 U. S. 432 (1925).

10. *Reid v. Colorado*, 187 U. S. 137 (1902); *Thornton v. U. S.*, 271 U. S. 414 (1926).

11. *Child Labor Case*, 247 U. S. 251, 270 (1918).

power in the field of interstate commerce[12]; a power to protect, not to prevent the flow of, commerce.

As to matter and transactions not inherently harmful the Congress has no general power to close the channels of interstate commerce.

The point has been presented but once to the Supreme Court, in the *Child Labor Case* (*Hammer* v. *Dagenhart*[13]). There a Federal statute attempting to exclude from interstate commerce any goods produced in factories employing child labor, was held unconstitutional. The Supreme Court, pointing out that such goods were "of themselves harmless," said that congressional power to "regulate" commerce did not include power to exclude from commerce harmless goods. The Congress's power to regulate commerce, said the Court, is the power to "control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities"[14].

The decision in the *Child Labor Case* has been repeatedly and severely criticized[15]. It has been frequently urged that the argument of the Court, in the majority opinion, that the evil of child labor was complete prior to shipment, hence was not furthered by the shipment, ignores economic realities[16]. The evil, it is argued, was furthered by the shipment because the manufacturers using child labor obtained a wider market, and child labor standards in other states were imperiled.

Possibly the holding in the case is none too strong. In the subsequent case of *Brooks* v. *U. S.*[17] the Supreme Court upheld a Federal statute closing the channels of interstate commerce to stolen automobiles, and the difference between that and the *Child Labor Case* seems but one of degree. The difference, however, is rather marked. To have interpreted the commerce clause as empowering the Congress to prescribe conditions of manufacture, as was attempted in the *Child Labor Case,* would have involved a far greater surrender of states' rights than did an interpretation empowering it to prosecute the theft of automobiles. The one interpretation would have compelled the states to adopt a social welfare policy; the other merely aided the states in the suppression of crime. Possibly the distinction that the Court had in mind was that in the one case the Tenth Amendment would be violated, and in the other it would not.

In any event, even should the decision in the *Child Labor Case* be later reversed, it seems clear that the Congress has no power to close the channels of interstate commerce to transactions that are inherently harmless, and by that means to force Federal regulation on a field otherwise beyond its control.

Indeed, the theory set forth in the *Child Labor Case* seems to involve the Supreme Court in certain inconsistencies. The Court, in that case, said that the Congress may not close the channels of interstate commerce to harmless goods because power to do so was never delegated to it; that power to "regulate" interstate commerce did not include power to destroy such commerce[18]. Yet in other cases the Supreme Court has held that the power to "regulate" commerce *with foreign nations* included power to destroy such commerce; that the Congress, in the exercise of its commerce power alone, may prohibit the importation of any article, however harmless, and may condition its importation upon compliance with Federal regulation[19].

It seems inconsistent to hold that the Constitution delegated to the Congress power to close the channels of *foreign* commerce to harmless articles, yet delegated no similar power as to *interstate* commerce. For the power to regulate foreign commerce and the power to regulate interstate commerce were delegated to the Congress in the same sentence in the Constitution, and in that sentence the verb "regulate" was used but once, applying in that one usage to both types of commerce—i. e., "The Congress shall have power (3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[20]. It is difficult to see how the one word "regulate" could have delegated one type of power as to foreign commerce and a different type as to interstate commerce. On this point Justice Story in his treatise on the Constitution[21] said: "If this be its admitted meaning in its application to foreign nations, it must carry the same meaning throughout the sentence."

It would seem that the same power must have been delegated to the Congress with regard to interstate commerce as with regard to foreign commerce; the power, however, over interstate commerce being subject to certain constitutional limitations not applicable to foreign commerce. No individual, says the Supreme Court, has any vested right to trade with foreign nations, hence the power of the Congress over foreign commerce is not limited by the due process requirements of the Fifth Amendment[22]; as to interstate com-

12. *Brooks v. U. S.*, 267 U. S. 432 (1925).
13. 247 U. S. 251 (1918).
14. 247 U. S. 251, 269-270. The Court, in its opinion, stated that the statute in question was repugnant to the Constitution in a twofold sense—i. e., it was in substance a regulation not of interstate commerce but of the manufacture of goods, and also it exceeded the commerce power of Congress in attempting to exclude from commerce goods that were inherently harmless.
15. *Gordon*, "The Child Labor Law Case," 32 Harv. L. Rev. 45; *Corwin*, "Congress's Power to Prohibit Commerce," 18 Cornell L. Quar. 477; *Sutherland*, "The Child Labor Cases and the Constitution," 8 Corn. L. Quar. 338; Note, 47 Harv. L. Rev. 85.
16. See note [15].
17. 267 U. S. 432 (1925).
18. Compare, *Isaacs*, "The Securities Act and the Constitution," 43 Yale Law Journal, 218, 224-225: "What was the open object of withdrawing the control of interstate commerce from the states? Was it not to permit a free flow of commerce across state borders? We were to have none of the petty tariffs, the discriminations against goods from other states, the stoppage at frontiers, that made the commercial map of eighteenth century Europe into a crazy quilt. The free flow of commerce throughout the length and breadth of the land was to be assured by taking away the power of regulating such commerce from the states and confiding it to a central government. When this power is made the basis of an act which makes a curious caution necessary in crossing state borders and thus tends to confine financing operations within the borders of single states, we are confronted with a paradox of a type not infrequent in legal history. The power vested in Congress in the hope of making business free to cross state borders is utilized so as to erect barriers against it whenever it meets a state line."
19. See *Buttfield v. Stranahan*, 192 U. S. 470, 492-493 (1904); *Lottery Case*, 188 U. S. 321, 332 (1903).
20. Constitution, Art. I, sec. 8.
21. "Commentaries on the Constitution," 4th Ed., sec. 1065.
22. *Buttfield v. Stranahan*, 192 U. S. 470, 493 (1904): "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."

merce the Fifth Amendment is applicable[23]. And the limiting effect of the Tenth Amendment on Federal power, discussed *infra*, would seem far more applicable to its power over interstate commerce than over foreign commerce.

Furthermore, if power to close the channels of interstate commerce to harmless goods was never delegated to the Congress, it is difficult to see what became of it. For prior to the adoption of the Constitution each state, as an incident of its sovereignty, had such power[24]; and following the adoption of the Constitution it no longer has it[25].

Accordingly, instead of reasoning, as the Court did in the *Child Labor Case*, that the power to regulate interstate commerce does not include power to exclude harmless matter from such commerce, it would seem more accurate to say that the delegated power to regulate interstate commerce gives the Congress sovereign power over such commerce, but that that power is limited by the Bill of Rights; that the Congress may not close the channels of interstate commerce to inherently harmless matter, because to do so would be confiscatory hence violative of the due process requirements of the Fifth Amendment, and in addition would give the Congress power by indirection to regulate purely intra-state activities, in violation of the Tenth Amendment.

Under the present complexity of business and living conditions if the Congress, under its commerce power, could arbitrarily exclude harmless matter from interstate commerce unless Federal regulations were complied with it could control practically every feature of intra-state business life. That any interpretation of the commerce power that would lead to such a result would be held destructive of the rights reserved to the states, hence violative of the Tenth Amendment, seems conclusively shown by the language of the Supreme Court on numerous occasions.

Thus, in *The Employers' Liability Cases*[26] the Court, per White, J., refuted an argument for the extension of congressional power under the commerce clause by saying[27]:

"It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

There are numerous additional statements to the same effect[28].

That the attitude of the present Supreme Court is unchanged on this point is shown by the unanimity of the decision in the *Schechter* case[29] where, per Hughes, C. J., the Court said:

"If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."

The Tenth Amendment, therefore, seems to stand in the way of any interpretation of the commerce clause that would give the Congress arbitrary power to close the channels of interstate commerce, and to condition their use upon compliance with Federal regulation.

Furthermore, a Federal statute that prescribes regulations for an intra-state activity and then compels compliance by closing the channels of commerce, as in the present Act, would seem to show on its face that it is not a regulation of commerce but is an attempt by the Congress to do indirectly what it may not do directly. In such case the Supreme Court would consider the congressional motive back of the statute and hold the statute unconstitutional, even though the Congress had unquestioned power to close the channels of commerce. The Congress may not use its powers, even those it unquestionably has, to achieve indirectly a result beyond its power, when its purpose to that effect appears upon the face of the act.

The rule to this effect is best enunciated in the *Child Labor Tax Case*[30], where the Congress attempted by heavy taxation of child labor industries to compel the abandonment of such labor. The congressional power to tax was unquestioned, yet it appeared on the face of the act that the real motive of the Congress was not to tax but to regulate child labor, a matter beyond its control. The Court declared the act unconstitutional, saying [31]:

"But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the power of Congress and completely wipe out the sovereignty of the States."

The rule, which is again strongly enunciated in *Hill* v. *Wallace*[32], would apply to the commerce power with equal force as to the taxing power.

From the foregoing it seems clear that irrespective of the criticisms to which the *Child Labor Case* is exposed, there is no power in the Congress to close the channels of interstate commerce to harmless transactions; and that even if there were such power it could not be used, in the form attempted in the present Act, to achieve indirectly the regulation of a field otherwise beyond congressional control.

In order, therefore, for the present Act to be sustained under the congressional power to close the chan-

23. In *Carroll v. Insurance Co.*, 199 U. S. 401, 410 (1905), the Court, per Holmes, J., said with reference to interstate commerce: "It is true that by the provision in the body of the instrument Congress has power to regulate commerce, and that the act of Congress referred to in the cases cited was passed in pursuance of that power. But even if the Fifth Amendment were read as contemporaneous with the original Constitution, the power given in the commerce clause would not be taken to override it so far as the Fifth Amendment protects fundamental personal rights."

24. *Gibbons v. Ogden*, 9 Wheat. 1, 227 (1824). See also Articles of Confederation, Art. 9, § 1, expressly reserving to the states the right to prohibit "exportation or importation of any species of goods or commodities whatsoever."

25. *Brimmer v. Rebman*, 138 U. S. 78 (1891); *Minnesota v. Barber*, 136 U. S. 313 (1890); *Voight v. Wright*, 141 U. S. 62 (1891).

26. 207 U. S. 463 (1907).

27. 207 U. S. 463, 502.

28. See *Kidd v. Pearson*, 128 U. S. 1, 21 (1888); *U. S. v. Knight*, 156 (U. S. 1, 13 (1895); *Keller v. U. S.*, 213 U. S. 138, 148 (1909); *Hill v. Wallace*, 259 U. S. 44, 67 (1922); *Heisler v. Thomas*, 260 U. S. 245, 259-260 (1922). For a discussion *contra*, see *Corwin*, "Congress's Power to Prohibit Commerce," 18 Cornell L. Quar. 477.

29. *Schechter v. U. S.*, 295 U. S. 495, 546 (1935).

30. 259 U. S. 20 (1922).

31. 259 U. S. 20, 37-38.

32. 259 U. S. 44.

nels of commerce, it must appear that the matter excluded from commerce (i. e. transactions on unregistered exchanges) is inherently harmful.

Had the Congress, following its investigations, expressly found that such transactions were inherently harmful, such a finding would be given weight of course by the Supreme Court. But the Congress made no such finding. It found merely, as set forth in the preamble to the Act, that prices of securities on such exchanges are "frequently" susceptible of artificial manipulation.

It requires no argument to show that security transactions, even on unregistered exchanges, are not inherently harmful in the uniform sense that impure drugs, diseased cattle, misbranded foods and the like are harmful. Even on unregistered exchanges the vast majority of sales made are harmless and for honest value. The fact that the field of security transactions is one in which fraud may occur, so that regulation of the entire field under the state police power is proper[33] and desirable, is not sufficient to make all transactions within the field inherently harmful. If that were not so, the Congress could force Federal regulation upon all fields in which the state police power could be exercised, by conditioning the use of the channels of interstate commerce. As pointed out, *supra*, any interpretation of the commerce power that leads to such a result is invalid as violative of the Tenth Amendment.

The present Act, therefore, does not seem sustainable under the congressional power to close the channels of interstate commerce.

(b) Closing the Mails

Nor does the Act seem sustainable under the congressional power to close the mails.

No exact limitation on the congressional power to close the mails has ever been established by the Supreme Court; no Federal statute closing the mails to any type of matter has ever been held unconstitutional[34].

Congressional power on this point has never been severely tested. As with the channels of interstate commerce, the Congress may exclude from the mails matter that is inherently harmful, and under that power Federal statutes have been held constitutional closing the mails to lottery tickets[35], schemes to defraud[36], and matter deemed treasonable[37]. But in no statute that has reached the Supreme Court has the Congress spread its wings and attempted by closing the mails to regulate a field otherwise beyond its reach[38].

That the Congress has no such power seems clear. The postal power is limited by the Bill of Rights just as the commerce power is[39]; and, as with the commerce power, the Tenth Amendment prohibits any interpretation of the postal power that would enable the Congress to close the mails at will or to condition their use upon compliance with Federal regulation. Otherwise every feature of modern business life could be brought under Federal control. The arguments made *supra* with regard to the commerce power apply with even greater force to the postal power.

It would seem, therefore, that if congressional power to pass the present Act is to be found it must be found elsewhere than in the power the Congress has to close the mails or the channels of interstate commerce.

II

The Act cannot be sustained on the theory that it is a regulation of interstate commerce.

Transactions on securities exchanges are never interstate commerce.

If dealings on the securities markets were interstate commerce they would, of course, be subject to congressional regulation. Such, however, seems clearly not the case.

Certainly transactions on the securities exchanges frequently precede and follow interstate dealings. Although statistics are unavailable, it is undoubtedly a fact that an appreciable percentage of all deals on the important exchanges involve sales or purchases on behalf of principals who are in different states. The security is shipped from outside the state for sale on the exchange, and following the sale is shipped outside again to the purchasing principal.

Even under conditions as favorable as that, however, transactions on securities exchanges cannot be classed as interstate commerce.

Nothing that occurs on the exchange ever requires or contemplates any interstate shipment or delivery. Sales are made in *viva voce* transactions between a buying and a selling broker on the floor of the exchange, with delivery in the same city within a specified time—intra-state sales, completely performed by intra-state delivery. Such transactions are never interstate commerce. Numerous decisions by the Supreme Court put the matter beyond all question.

In *Hopkins v. U. S.*[40] a bill was brought under Federal anti-trust statutes for the dissolution of the Kansas City Live Stock Exchange. It was shown that in the vast majority of the transactions on the Exchange cattle were shipped from outside the state to local brokers, sold by them on the Exchange to other brokers, and by the purchasing brokers shipped to points outside the state. The Court held that transactions on the Exchange were not interstate commerce, saying:

"The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce. . . ."[41]

In a dictum the Court also discussed our identical problem, and said:

"Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations. . . . Is a broker whose principal lives outside of New York State, and who sends him the shares of stock or the bonds

33. See *Hall v. Geiger-Jones*, 242 U. S. 539 (1916); *Caldwell v. Sioux Falls*, 242 U. S. 559 (1916); *Merrick v. Halsey & Co.*, 242 U. S. 568 (1916).

34. For an excellent review of the law on this subject, see *Rogers*, "The Extension of Federal Control Through the Regulation of the Mails," 27 Harv. L. Rev. 27.

35. *Ex parte Jackson*, 96 U. S. 727 (1877); *In re Rapier*, 143 U. S. 110 (1891).

36. *Public Clearing House v. Coyne*, 194 U. S. 497 (1903); *Badders v. U. S.*, 240 U. S. 391 (1915); *Leach v. Carlile*, 258 U. S. 138 (1921).

37. *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407 (1920).

38. In *Lewis Pub. Co. v. Morgan*, 229 U. S. 288 (1912), Federal statute denying the privilege of second-class mail rates to newspapers failing to comply with Federal regulation that required publication of the names of stockholders of the newspapers, was held valid. Such a statute, said the Court, did not deny to non-complying newspapers the use of the mails but merely denied to them the special privilege of second-class mail rates.

39. *Burton v. U. S.*, 202 U. S. 344, 371 (1905). See also, *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 430 (1920).

40. 171 U. S. 578 (1898).

41. 171 U. S. 578, 590.

of a corporation created and doing business in another State, for sale, engaged in interstate commerce? . . . We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from states different from the one in which the exchange is situated and the sale made."[46]

In *Ware & Leland v. Mobile County*[43] an Alabama statute imposed a tax on the business of the Mobile office of the defendants, who were cotton brokers having offices in Mobile, New York and New Orleans. The business conducted in the Mobile office consisted in accepting local orders to buy or sell cotton futures, and relaying the same by private wire to New York and New Orleans for execution on the cotton exchanges there. Customarily there were no deliveries, the transactions in futures for each customer usually canceling out. A few interstate deliveries actually resulted, however. The Alabama tax on the business was held valid on the ground that the business of the Mobile office, although it involved interstate communications, was not interstate commerce, since no interstate shipment was actually required under the contracts which the Mobile office made.

In *Moore v. New York Cotton Exchange*[44] a bill was brought under Federal anti-trust statutes for a decree adjudging the New York Cotton Exchange a monopoly and canceling its contract with Western Union re ticker service. The decree was refused on the ground that the Exchange was engaged in purely local business. In language equally applicable to sales on securities exchanges, the Court said[45]:

"The New York Exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or transactions to which they relate into subjects of interstate commerce. . . . The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough."

Transactions on securities exchanges come exactly within these holdings. They are purely local in their inception and execution; they neither require nor contemplate interstate shipment; in fact, they expressly require intra-state delivery, which delivery consummates and terminates the transaction for which the facilities of the exchange are used.

Indeed, authority can be cited indicating the possibility that stocks and bonds are not commodities, hence that dealings in them are not commerce at all[47]. If that proposition be sound, which seems very doubtful[48], then it is even clearer that transactions on securities exchanges do not constitute interstate commerce. Interstate dealings and communications regarding transactions that are not commerce do not themselves constitute interstate commerce[49].

It seems clear, therefore, that the present Act cannot be sustained as a regulation of interstate commerce.

III

The Congress has power to regulate businesses which, though wholly intra-state, directly affect interstate commerce.

Federal regulation of securities exchanges can probably be sustained under that power.

The power to regulate interstate commerce gives the Congress no power to regulate matters that affect such commerce only indirectly. Thus, the Congress has no power to regulate the mining of coal[50], or the manufacture of goods[51], even though they are to be shipped in interstate commerce, or to fix the wages of intra-state labor even though the effect of such wages on interstate commerce can be shown[52].

A contrary rule would, of course, mean almost complete centralization in the Congress of all governmental power, for there are few commercial activities that do not affect interstate commerce at least indirectly.

When, however, transactions affect interstate commerce not indirectly but directly, they are subject to congressional regulation even though they of themselves are wholly intra-state[53]. Congressional regulation of certain types of transactions on the important securities exchanges seems sustainable under that principle, because of their direct effect on all security sales throughout the nation.

Transactions on important exchanges, in commodities of any sort that move in interstate commerce, have more than a mere local effect. The prices which are established in such transactions are immediately disseminated throughtout the nation and used as the price basis for other transactions in the same commodities.

This is especially true of transactions on the important securities exchanges. The price established on the New York Stock Exchange is, as a practical matter, determinative of the price at which the same security may be sold elsewhere in the country. If the price on the New York Stock Exchange is artificially enhanced or depressed, the price in other places, even in transactions otherwise unrelated to the Exchange, at once makes a corresponding change.

Accordingly, if it be true that listed securities constitute commodities moving in interstate commerce throughout the nation, then transactions on the important exchanges, though wholly intra-state them-

42. 171 U. S. 587, 597-598.
43. 209 U. S. 405 (1907).
44. 270 U. S. 593 (1925).
45. 270 U. S. 593, 604.
46. See also, *Wiloil Corp. v. Penn.*, 294 U. S., 169 (1934), where a state tax on the sale of certain goods was upheld despite the fact that delivery was made by means of an interstate shipment, because the contract of sale was not interstate commerce as it "did not require or necessarily involve transportation across the state boundary." Compare, *Fed. Tr. Comm. v. Paper Assn.*, 273 U. S. 52 (1926) where a contract of sale was held to be interstate commerce even though it did not expressly require delivery from outside the state, when it was shown that the parties contemplated such a delivery and actually made such a delivery.
47. *Hemphill v. Orloff*, 277 U. S. 537 (1927), aff'g 238 Mich. 508 (213 N. W. 867); *Nathan v. Louisiana*, 8 How. [U. S.] 73 (1850); *Hopkins v. U. S.*, 171 U. S. 578, 597-598 (1898); *Hall v. Geiger-Jones*, 242 U. S. 539, 558 (1916).
48. See, *Lottery Case*, 188 U. S. 321 (1903), holding lottery tickets objects of commerce.
49. *Paul v. Virginia*, 8 Wall. 168 (1868); *Hooper v. California*, 155 U. S. 648 (1894).
50. *United Mine Wkrs. v. Coronado Coal Co.*, 259 U. S. 344 (1921).
51. *United Leather Workers v. Herkert*, 265 U. S. 457 (1923).
52. *Schechter v. U. S.*, 295 U. S. 495 (1935).
53. See, *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295 (1924); *Bedford Co. v. Stonecutters' Assn.*, 274 U. S. 37 (1926); *Schechter v. U. S.*, 295 U. S. 495 (1935).

selves, offer a field for manipulation that would affect, in a determinative way, the prices at which such commerce could move. On principle it would seem that such an effect is direct.

In so far as the question has been presented to the Supreme Court, the proposition just stated seems sustainable on authority as well as on principle.

In *United States v. Patten*[54] certain defendants indicted under Federal anti-trust statutes for conspiracy to run a corner on the New York Cotton Exchange, defended on the ground that the proposed transactions were wholly intra-state. The Supreme Court, however, upheld the indictment despite the intra-state nature of the transaction, on the theory that they affected interstate commerce "directly" because by cornering the supply of cotton, "normally a subject of trade and commerce among the States," the defendants could "enhance artificially its price throughout the country"[55].

In *Chicago Board of Trade v. Olsen*[56] suit was brought by the Chicago Board of Trade to enjoin enforcement of the Grain Futures Act prescribing Federal regulations for dealings in grain futures on boards of trade. It was contended that dealings in grain futures, which were largely mere paper transactions involving no deliveries of actual grain, affected the movement of grain in interstate commerce only indirectly if at all, hence were beyond the power of the Congress to regulate. The Court held the Act constitutional, however, pointing out that prices in grain futures were subject to occasional artificial manipulation; that such price manipulation on a board as important as the Chicago Board affected the nationwide prices not only of futures but also of grain moving in interstate commerce; and that whatever affected the nation-wide price of a commodity moving in interstate commerce directly affected interstate commerce.

"The question of price dominates trade between the States. Sales of an article which affect the countrywide price of the article directly affect the countrywide commerce in it."[57]

Certain writers on the present subject have contended that the *Olsen* case is not authority for the proposition that Federal control of securities exchanges is constitutional[58]. The *Olsen* case, in their opinion, merely held that the Congress had power to regulate a continuous current of grain in interstate commerce, flowing through a given point, and throws no light on the question of securities exchange regulation because there is no analogous current of securities flowing through a given point.

In the *Olsen* case grain moving in interstate commerce passed through Chicago in a continuous current, as through the neck of a bottle, *en route* from Western grain fields to Eastern markets. At Chicago it was taken off the train for the purposes of inspection, weighing and sale, but those purposes were so temporary as not to remove the grain from interstate commerce. The writers above referred to contend, therefore, that the Federal statute in that case merely regulated a continuous movement of grain in interstate commerce and was identical in effect with the statute upheld in *Stafford v. Wallace*.[59]

In *Stafford v. Wallace*, decided slightly before the *Olsen* case arose, Federal statute required that all charges for services and facilities in the Chicago Stock Yards in connection with cattle passing through be under Federal regulation. It was shown that the Stock Yards were not a place of final destination, but were the bottle-neck through which cattle moved, in a continuous current of interstate commerce, from West to East. The statute was held to be within congressional power because the handling of the cattle in the yards not only directly affected interstate commerce but was a part an incident of it.

The language of the Court in the *Stafford* case clearly shows that the Court based the constitutionality of the statute on the fact that the cattle affected by the stockyards' activities were passing through Chicago in a continuous current of interstate commerce. A similar continuous current of grain was passing through Chicago in the *Olsen* case; but whereas in the *Stafford* case the existence of such current was essential to the decision, in the *Olsen* case it was clearly incidental. For in the *Stafford* case the transactions regulated by the statute dealt directly with the current of commerce there flowing, and if allowed to go unregulated could have hampered or even stopped such flow; but in the *Olsen* case the transactions regulated by the statute dealt not with the current of commerce in grain that happened to be passing through Chicago but with grain futures, transactions involving future, not present, deliveries, hence that affected the grain passing through Chicago only as they affected grain moving anywhere else in the nation—i. e., by affecting the countrywide price. The effect on interstate commerce of the prices in future dealings would have been the same whether the interstate commerce involved had concentrated in Chicago, as in the case of grain, or been scattered through out the nation, as in the case of securities. It is noteworthy that in the *Patten* case (*supra*, note 54) no such concentrated current of commerce existed.

Conceivably the Court might hold that a continuous current of securities moving in interstate commerce flows into and out of New York, similarly to grain and cattle into and out of Chicago. Proof of such a current would be difficult, however. Many, quite possibly the majority, of the securities actually shipped into New York for sale on the Exchange remain in New York for safekeeping or to secure loans.

However, proof of such a current does not seem necessary, to bring the present Act within the rule of the *Olsen* case. Sales that affect the nationwide price of an article affect the nationwide commerce in it whether such commerce concentrates at one point or remains scattered.

It hardly seems likely that the rule of the *Olsen* case would be sustained by the Supreme Court if extended to its logical extreme. Logically, the rule of that case could be used to bring under Federal control all businesses whose sales affected countrywide prices. "Sales of an article," said the Court, "which affect the countrywide price of the article directly affect countrywide commerce in it."[60] Extended to its logical extreme that rule would embrace not only the exchanges but also all businesses of national size. Ford's prices affect the countrywide price of cars; Standard Oil's prices

54. 226 U. S. 525 (1912).
55. 226 U. S. 525, 540-541.
56. 262 U. S. 1 (1923).
57. 262 U. S. 1, 40.
58. See, "The Extent of Federal Power to Regulate Stock Exchanges," by Raoul E. Desvernine, Edward McGarvey and Jackson S. Hatto; Brief by J. M. Landis, Senate Hearings, 1934, Stock Exchange Practices, vol. 15, p. 6642; Brief by Thomas B. Gay on behalf of New York Stock Exchange, same, p. 6647.
59. 258 U. S. 495 (1921). See also *Swift v. U. S.* 196 U. S. 375 (1904), and *Tagg Bros. v. U. S.* 280 U. S. 420 (1929).
60. 262 U. S. 1, 40.

affect the countrywide price of oil; yet it hardly seems likely that attempted Federal regulation of such businesses would be sustained.

The difference between the effect of the largest manufacturer's prices on the countrywide price, and the effect of exchange prices on the countrywide price, is certainly a difference of degree only. However, the difference seems real. It is doubtful if any manufacturer so dominates his field that sales by him are as determinative of the countrywide price of the article sold as are sales on the important securities exchanges. Difference of degrees are determinative in constitutional law, hence to hold Federal regulation of securities exchanges valid on the theory of the *Olsen* case would not necessarily mean that Federal regulation of large businesses would be valid.

In the *Hopkins* case, the *Ware & Leland* case, and the *Moore* case (*supra*, notes 40, 43 and 44) the application of the rule just enunciated would possibly have led to a different result. It does not appear, however, that this feature of those cases was considered by the courts.

The rule of the *Olsen* case would apply to the present Act only if interstate commerce in securities actually exists. That, of course, is a question of law as well as of fact. If securities, as a matter of law, are not commodities, then there is no interstate commerce in them even if, as a matter of fact, they are dealt in among the states. Interstate transactions as to matter that is not commerce are not themselves interstate commerce[61]. However, although a certain amount of authority can be cited to the contrary[62], it seems very doubtful that the Supreme Court would hold securities not to be subjects of commerce. They are bought and sold, and though representative in character they seem equally subjects of commerce with lottery tickets, which the Supreme Court expressly held were subjects of commerce[63].

As to whether securities, as a matter of fact, circulate among the states, the congressional finding on the point set forth in the Act itself will receive the Court's consideration. After wide investigation, the Congress found as a fact that transactions in listed securities "constitute an important part of the current of interstate commerce"[64], and such finding must be accepted by the Supreme Court as a fact unless it is unreasonable[65]. Statistics, of course, are not available as to the extent to which listed securities circulate among the states, but that they move from state to state to an important extent seems too clear and too demonstrable to justify a rejection by the Court of such finding.

It seems probable, therefore, that in passing on the validity of the present Act the Supreme Court will accept as facts the congressional findings that listed securities constitute an important part of interstate commerce, and that prices on unregulated exchanges are frequently subject to artificial manipulation[66].

In view of those facts the present Act, in so far as it regulates the manipulation of prices on important exchanges, seems constitutional. Transactions leading to such manipulation directly affect the nationwide prices of securities moving in interstate commerce, hence directly affect interstate commerce in such securities.

61. See note *49*, *supra*.
62. See note *47*, *supra*.
63. *Lottery case*, 188 U. S. 321.
64. 15 U. S. C. A. 78-B.
65. *Chicago Board of Trade v. Olsen*, 262 U. S. 1.
66. 15 U. S. C. A. 78-B.

IV

Provisions in the present Act having no real or substantial relation to interstate commerce, and provisions delegating excessive legislative powers to an administrative board, seem unconstitutional.

(*a*) *Provisions having no relation to interstate commerce.*

While certain provisions of the Act regulate matters directly affecting interstate commerce, other provisions prescribe regulation for fields that have no relation to such commerce. To the extent that it attempts the latter the Act seems unconstitutional. For nothing could be clearer, on both principle and authority, than that the Federal commerce power may not be used to regulate matters that have no relation to commerce.

Thus, in *Adair v. U. S.*[67] a Federal statute penalized any interstate carrier that discriminated against employees because of union affiliation. In holding such regulation beyond the commerce power of the Congress the Supreme Court said[68]:

"Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

Similarly, in the recent *Railroad Pension Case*[69] *(Railroad Retirement Board v. Alton R. Co.)* a Federal statute imposed pension regulations on all interstate carriers. The Supreme Court declared the Act unconstitutional on the ground that the field thus regulated had no direct relation to interstate commerce, the Court saying[70]:

"The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate transportation. If that question is answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. . . Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such?"[71]

It is evident, therefore, that provisions of the Act can be supported under the commerce clause only if they relate to commerce; and provisions with no relation to commerce are insupportable regardless of their social desirability.

Provisions of the Act regulating artificial price manipulations seem supportable. Under the theory of the *Olsen* case, regulations in that field relate directly to interstate commerce.

Accordingly, the requirement in the Act that all exchanges register as national securities exchanges; the prohibitions in the Act against artificial manipulation of security prices; the regulation of the use of manipulative and deceptive devices on exchanges; the requirement that all securities dealt in on registered exchanges be duly registered and that properly informative reports relative to them be furnished periodically by the issuers —all of those provisions seem supportable under the theory of the *Olsen* case. They seem reasonable, and bear real and substantial relation to the prevention of

67. 208 U. S. 161 (1907).
68. 208 U. S. 161, 178.
69. 295 U. S. 330 (1935).
70. 295 U. S. 330, 368 (1935).
71. See also, *U. S. v. Chi. etc. R. Co.*, 282 U. S. 311, 326 (1930).

artificial price manipulations that could directly and adversely affect interstate commerce in securities.

Other provisions of the Act, however, have no apparent relationship to interstate commerce. Such provisions include the regulation of the solicitation and giving of proxies in respect of registered securities; the requirement that changes in beneficial ownership by holders of more than ten per cent of any registered equity security be disclosed and that all profit from such change inure under certain circumstances to the issuer; and possibly the regulation of specialists, odd-lot dealers, and brokers dealing for their own account.

Such provisions, the Act declares, are "for the protection of investors." Quite possibly they serve that purpose. It is submitted, however, that they relate in no way to interstate commerce in securities, hence are insupportable. If congressional power were adequate to prescribe all regulations necessary "for the protection of investors," then, as the Supreme Court pointed out in the *Railroad Pension Case*, "there is no limit to the field of so-called regulation."

(b) Provisions regulating the use of credit, and delegating powers to the Federal Reserve Board.

In addition to the provisions just discussed, further provisions of the Act regulate the field of margins and credits, in connection with security purchases.

The Federal Reserve Board is directed to "prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained" on any registered security; and no person, whether broker, dealer or not, may extend credit for the purpose of purchasing or carrying a registered security, except in accordance with rules and regulations so prescribed. Borrowings by brokers, dealers and exchange members are similarly controlled.

Such provisions are declared by the Act to be "for the purpose of preventing the excessive use of credit for the purchase or carrying of securities." Thus their obvious and declared purpose is not to regulate transactions on securities exchanges but to regulate and control the amount of capital that can become available for such transactions.

It is submitted that the field thus regulated is beyond congressional reach. Excessive use of credit undoubtedly affects interstate commerce; but it does not follow from that that the Congress has power to regulate it. Excessive use of capital, excessive production, or excessive wages also affect interstate commerce, yet they are not subject to congressional control. Their effect on interstate commerce is held not to be direct; and in so holding the Supreme Court is not guided by narrow, legalistic construction but by the very broad consideration that to interpret the commerce clause as giving the Congress power to regulate so broad a field would be destructive of our dual form of government[72].

The same considerations apply to the present congressional attempt to regulate the excessive use of credit.

The extension of credit for use in interstate commerce seems to precede commerce just as clearly as manufacture precedes commerce; the one is no more a part of commerce than the other, hence no more subject to congressional control. Nor is the effect of credit extension on interstate commerce direct. Certainly the extension of credit "for the purchase or carrying of securities" is one degree further removed from interstate commerce and from transactions affecting the countrywide price of securities than is the actual transaction on the exchange, where the credit is later used.

Furthermore, any interpretation of the commerce clause that would give the Congress power to regulate either (a) the amount of credit that may be advanced on goods normally subjects of interstate commerce, or (b) the amount that may be advanced for the purpose of engaging in interstate commerce, would seem to lead to the same centralization of power in congressional hands that has so frequently been held violative of the Tenth Amendment[73].

For these reasons the provisions just referred to seem invalid.

A further reason for questioning their validity lies in their broad delegation of legislative power to the Federal Reserve Board.

Under the Constitution[74] all legislative power of the Federal government is vested in the Congress and may be exercised by the Congress only. That power may never be completely delegated to an administrative board; "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested"[75]. The most that can be delegated to an administrative board is the power to enforce in detail a legislative policy, which the Congress has declared, in accordance with a standard which the Congress has prescribed.

In other words, only the Congress itself can make a law; and statutes which give administrative officials power not merely to carry out the law but actually to determine what the law shall be, are invalid.

Illustrations of valid delegations of power by the Congress are numerous. In *Field v. Clark*[76] a Federal statute provided that certain duty-free articles of import should be stricken from the free list whenever any country of export ceased giving the United States equal reciprocity; and to the President was delegated the power of determining when reciprocity had ceased to be equal.

Thus the Congress itself passed the law, that required goods to be stricken from the free list whenever certain conditions arose, and delegated to the President merely the power to determine when those conditions had arisen. If the conditions arose, the President had no choice but to strike the goods from the free list.

In *Buttfield v. Stranahan*[77] a Federal statute provided that teas of inferior quality should not be imported, and directed the Secretary of Treasury to promulgate regulations classifying foreign teas as inferior or not according to "standard samples" of superior teas to be furnished by a board of seven tea experts.

Thus, the Congress itself passed the law, excluding inferior teas; it gave the Secretary no choice as to what the legislative policy should be. All that the Secretary was empowered to do was to determine, in accordance with a prescribed standard, when teas were inferior and when not[78].

Examples of invalid attempts to delegate legislative powers may also be cited. In *Panama Refining*

72. See notes 26-29, *supra*.

73. See notes 26-29, *supra*.

74. Constitution, Art. I, sec. 1: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

75. *Schechter v. U. S.*, 295 U. S. 495, 529 (1935).

76. 143 U. S. 649 (1891).

77. 192 U. S. 470 (1904).

78. See also, to same effect: *Union Bridge Co. v. U. S.*, 204 U. S. 364 (1906); *U. S. v. Grimaud*, 220 U. S. 506 (1910); *Hampton v. U. S.*, 276 U. S. 394 (1927); *U. S. v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *Radio Comm. v. Nelson*, 289 U. S. 266 (1932).

Co. v. Ryan [79] section 9 (c) of Title I of the National Industrial Recovery Act provided:

"The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum . . . produced . . . in excess of the amount permitted to be produced . . . by any state law. . . ."

The statute did not state what the law should be; it did not state whether the excess oil could or could not be transported; it merely authorized the President to decide that. The Congress thus attempted to delegate its essential legislative powers to the President, and the Supreme Court held the statute unconstitutional, saying:

"Accordingly we look to the statute to see whether the Congress has declared a policy with respect to that subject (i.e. transportation of oil); whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

". . . Section 9 (c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in sec. 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."[80]

As the Supreme Court said in *Wichita Railroad & Light Co. v. Public Utilities Commission*[81]:

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

Thus, in delegating legislative powers to an administrative board the Congress must (1) declare the legislative policy that the board is to enforce, and (2) establish a "standard" or "rules of decision" for the board's guidance in enforcing that policy. As a general rule it must also (3) prescribe an administrative procedure that complies with the requirements of due process of law[82].

To some extent the present Act complies with those requirements. It directs the Federal Reserve Board to prescribe rules and regulations as to the amount of credit that may be extended on a registered security, for "the purpose of preventing the excessive use of credit for the purchase or carrying of securities." The Act thus (1) declares a legislative policy, i. e., the prevention of the excessive use of credit in the purchase or carrying of securities; and (2) sets up a "standard" for the Board's guidance by specifying that

"For the initial extension of credit, such rules and regulations shall be based upon the following standard: An amount not greater than whichever is the higher of—

(1) 55 per centum of the current market price of the security, or

(2) 100 per centum of the lowest market price of the security during the preceding thirty-six calendar months, but not more than 75 per centum of the current market price."

However, the effect of this "standard" is weakened by the provision in the Act which immediately follows it, empowering the Board to prescribe margin requirements higher or lower than such "standard," provided the Board deems such change

"necessary or appropriate for the accommodation of commerce and industry, having due regard to the general credit situation of the country"; or

"necessary or appropriate to prevent the excessive use of credit to finance transactions in securities."

In other words, the only standard to guide the Board, in the last analysis, is the requirement that its rules and regulations be appropriate to prevent the excessive use of credit in the purchase and carrying of securities. But that was also the legislative policy declared. The Congress has declared a policy that "excessive" use of credit shall not be allowed, and as a standard to guide the Board has said that the use of credit which its regulations may allow shall not be "excessive." The declared legislative policy, and the prescribed "standard" to guide the Board, are thus identical. As in the *Panama Refining* case, the Act "establishes no criterion to govern" the Board's course.

Such a lack, together with the absence of any prescribed administrative procedure for determining when changes in the credit rates shall be made, seems to cast genuine doubt on the validity of the provisions.

(*c*) *Provisions regulating over-the-counter markets.*

By section 15, the Act provides that it shall be unlawful for brokers and dealers to use the mails or the instrumentalities of interstate commerce for the purpose of creating, or using the facilities of, any over-the-counter market

"in contravention of such rules and regulations as the Commission (i.e. Securities Exchange Commission) may prescribe as necessary or appropriate in the public interest and to insure to investors protection comparable to that provided by and under authority of this title in the case of national securities exchanges."

Thus, the Act does not state whether over-the-counter markets shall be regulated or not. It seems to declare no legislative policy for the Commission's guidance. It leaves to the Commission the decision not merely as to how the law shall be enforced but as to what the law shall be.

The language of the Supreme Court in *Panama Refining Co. v. Ryan,* in holding the statute invalid for too great a delegation of legislative powers to the President, seems very closely applicable to the present provisions. There the Court said[83]:

"So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit, and disobedience to his order is made a crime punishable by fine and imprisonment."

As shown *supra,* under (b) of this Point IV, when the Congress delegates legislative powers to an administrative commission it must (1) declare the legislative policy that the commission is to enforce, and (2) establish a standard for the commission's guidance in enforcing such policy. The above provision seems to fail as to the first requirement, and not to be free from doubt as to the second.

Conclusion

The field of constitutional law is necessarily one ruled by considerations of degree. Accordingly, precise forecasts are often difficult.

The present Act, however, seems constitutional in part, but certainly of doubtful validity as to some of its provisions.

79. 293 U. S. 388, 406, 415 (1934).

80. To the same effect is *Schechter v. U. S.,* 295 U. S. 495 (1935).

81. 260 U. S. 48, 59 (1922).

82. See, *Southern Ry. Co. v. Virginia,* 290 U. S. 190 (1933); *I. C. C. v. L. & N. Ry. Co.,* 227 U. S. 88 (1912); *Crowell v. Benson,* 285 U. S. 22 (1931).

83. 293 U. S. 388, 415.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

G. T. GARRATT'S *Lord Brougham* (Macmillan and Co., Ltd., London) is a definite contribution to English political biography. He was a great radical in the day when radicalism was both fashionable and dangerous. To him is due a major portion of the credit for the abolition of the "pocket boroughs" and the attainment of English electoral reform. He had in him something of the courageous knight errant, for he defied his king by defending Queen Caroline against the attempt to divorce her, and he was one of the greatest of law reformers.

It would seem that such a subject would be irresistible to a biographer. The tale is told in his own *Memoirs*, written in extreme old age, and in his biography in Campbell's *Lives of the Lord Chancellors*. Neither of these accounts is satisfactory. The *Memoirs* is chiefly a commentary, not always accurate, upon a mass of correspondence. Campbell, a coeval and rival, never forgave Brougham for his early success, and tried to write him down to his own stature. The best account of Brougham is in the first volume (long since out of print, and now hard to obtain) of Atlay's *Victorian Chancellors* (1906).

Mr. Garratt views Brougham with entire detachment and sets his career in proper perspective. The picture he draws is of the reformer whose success was attested by the fact that "the paradoxes of his early years had become platitudes long before he died."

Mr. Garratt accepts the view that Brougham made a mistake in accepting the Lord Chancellorship. Brougham's real forum was the House of Commons. This he forfeited by allowing himself to be kicked upstairs into the House of Lords. He lost touch with his followers and was never again able to make his leadership effective. Moreover, Brougham was not a great Chancellor. He had been trained in the law courts, and was impatient with the tedium of chancery. This was accentuated by the constant opposition of Edward Sugden, the leading equity barrister.

Brougham's real service as Lord Chancellor was not his judgments or opinions, but his pointing the way to much needed reforms. He succeeded Lord Eldon, under whom conditions had become so intolerable that even the Duke of Wellington remarked that he was "glad Brougham is Chancellor. He is the only man with courage and talent to reform that damned court." He was continually thwarted during his term of office, but lived long enough to see many of his ideas put into practice.

Mr. Garratt epitomizes Brougham's career in his last paragraph:

"He saw mankind not only in the slough of despond, but shackled as well. He may have had no vision of the Delectable Mountains, but we, in England, still struggling to reach firmer land, should be thankful to the man who more than anyone of his generation saw to it that we should at least be free to find our own way out."

WALTER P. ARMSTRONG.

Memphis, Tennessee.

Finger Prints: Secret Service: Crime Detection, by T. G. Cooke. 1935. Chicago: F. P. Publishing Association. This little volume contains an interesting account of a present-day most valuable method for the detection of the perpetrator of a crime—the finger print.

While for many centuries the monarchs of China were accustomed to seal important documents by an impression of their thumb upon softened wax—an unmistakable "Privy Seal"—it was not until well within the last century that the western world recognized that every individual had his own characteristic arrangement of the ridges and hollows of the finger tips. The first classification of finger tips seems to have been made by a German professor, Purkinje of Breslau university, in 1823, but it was Sir Francis Galton, an English scientist, who laid the foundation of the system now in use. This has been elaborated by Sir E. R. Henry, another Englishman, in the Government service, and the "Henry System" has been adopted in all English-speaking countries and some others. It has largely displaced the Bertillon system of identification based upon measurement of the various parts of the body, though this still has its uses occasionally.

Literally millions of finger prints are kept on record and hundreds of criminals often masquerading under assumed names have been identified by their agency.

In our present system, finger prints are divided into nine classes and there are countless variations in each class. But the print of an individual does not change, from infancy to old age. Even the destruction by acid or surgical operation is ineffective; the skin always has the same arrangement of hill and hollow, so long as there is a skin, and a finger print may have fifty characteristics all or any differing from those in any other finger print in the world.

The author, who teaches his art, studied at Scotland Yard, in Paris and elsewhere, and has given us a thoroughly readable and accurate account of this invaluable aid in the constant struggle of society with crime. He has added a number of cases in which the method was successful.

WILLIAM RENWICK RIDDELL.

Economics of Transportation, by D. Philip Locklin. 1935. Chicago: Pp. 788. Business Publications, Inc. —Mr. Locklin, who is assistant professor of economics in the University of Illinois, furnishes us in this ample volume with quite a comprehensive study of the sub-

ject of transportation and the agencies by which it is carried on. The author handles his abundant material skillfully and with due regard to the value of clear statement.

As one result, the work will serve as an excellent introduction to a field that has been often explored but not always fruitfully. No one can read this volume thoughtfully without acquiring a general idea of the place of transportation in our economic system and some notion of the problems that confront those who are responsible for transportation policies.

The book bears every evidence of careful study. The author has read extensively on his subject, as the list of selected references at the end of each chapter and the abundant notes conclusively demonstrate. The statements in the text show that these references have not only been read by the author, but have been chewed and digested. In short, Professor Locklin has spared no pains to bring to the reader's attention a very considerable collection of worthwhile authorities.

The thirty-five chapters cover a rather wide range, embracing both economic and historical aspects of the question. And while considerable space is devoted to water, highway and air transport, by far the greater portion of the book deals with railroads as the predominant factor in the situation.

The author deals at some length with the principles announced by the Interstate Commerce Commission in its work of regulating railroad freight rates upon particular commodities and between particular places. Generally speaking, he is sympathetic with the Commission's findings, although he does not hesitate to express his own opinion, sometimes at variance now with the Commission, and again with the Federal Coordinator, for whose views, however, Professor Locklin has great respect.

To this reviewer, who is a railroad employee, the author seems to have approached almost every controversial question with the preconceived idea that the railroads are probably wrong. In this respect, he reflects a point of view honestly entertained by a host of university instructors, whose labors smell strongly of the lamp.

Rarely does Professor Locklin find anything to commend in his account of railroad management or railroad practices. He has much to say about land grants, financial exploitation, unlawful discrimination and wasteful practices. He makes little or no mention of the notable improvement in railroad service in the last decade, of the high wages paid in the industry, of the comfort and safety of railroad travel and the contributions in the way of taxes made to the expense of government. He looks with complacency upon the possibility of government ownership. He is obviously sympathetic with the restrictions placed upon the railroads by governmental authority. This partisan bias is doubtless the result of much reading and little experience with actual management of railroad systems.

Despite these obvious defects, the work is a worthwhile contribution to the literature of transportation. The press work is excellent, and the index comprehensive.

R. V. FLETCHER.

Washington, D. C.

Legal Aid Bureaus, A Manual of Practice, by John S. Bradway. 1935. Chicago: Publication No. 47, Public Administration Service. Pp. viii, 80.—It is notoriously true, and highly important, that many deserving reform movements fail from inefficient administration. Legal aid in the United States can still be correctly styled a reform movement, despite its demonstrable necessity and sixty years or so of successful practice. Many—perhaps most—large cities have legal aid service of one sort or another. But smaller centers of population and rural areas are often still outside the legal aid network, and scarcely any metropolis is beyond the need of further lawyer's help for the poor.

Those who seek more fully to meet these needs will find in Mr. Bradway's compact book not only warnings of mistakes to be avoided, but a wealth of wholesome affirmative suggestion. Such suggestions run all the way from the ideals of the work and the general problems of policy in surveying a field, and launching and financing a legal aid extension, to small but significant details of office practice. There are architectural sketches of typical set-ups, record forms, samples of correspondence and notices, organization and operating charts.

The book is clearly written, succinct, and carefully arranged. As a job of systematizing it merits attention from the profession at large. Lawyers are not always the best organizers of their own affairs. No book, of course, can insure good professional administration. That is a matter of men rather than mere marching orders. Mr. Bradway, however, has written here many helpful words for the wise. Nor can his book fail to suggest considerations lying much deeper than the immediate expedient. Nobody could speak with such convincing precision about the operation of a device for social betterment were it not for more than half a century's devotion by hundreds of men and women, to whom the most welcome tribute will be unceasing enlargement of the work they have loved

J. M. MAGUIRE.

Harvard Law School.

The Law and Custom of the Constitution. By Sir W. R. Anson. Vol. II (The Crown) Parts I and II. 4th ed., by A. Berriedale Keith. Oxford. 1935. Pp. xxxi, 325; xv, 414.—Twenty eventful years have passed since the last edition of these monumental volumes, and much vital law and binding custom have developed. As a consequence, Professor Keith was faced with a formidable task—to preserve, to curtail and to add. This he has carried out, not only with consummate art, but with insight and scholarship. Anson had always a distinct flavor: it was a *law* book, not a descriptive piece of book-making; it always recognized historical processes; it possessed dignity, indeed austerity. On the other hand, it turned aside from matters dealt with by Dicey. Prof. Keith has succeeded, while compressing, in preserving essentials, including the historical treatment and Anson's opinions, and above all the quality of the approach and style. He has added, however, important chapters on the delegation of powers to the executive, the judicial functions of the executive, the judicial control of the executive—matters which, since the last edition, have grown in legal importance and in social significance. In addition, the law of allegiance has required a newer and wider setting, while procedure against the crown has been given adequate treatment. Part II, however, is perhaps the more important, for here the outstanding authority brings to bear almost unequalled knowledge on the law and custom of the Dominions and dependencies. Here we have a succinct, but adequate treatise, on developments the most significant for edi-

torial revision. On every page, Professor Keith's learning illuminates these and there emerges a picture true in detail and in perspective. The skill is admirable; for he avoids the expression of his personal views on controversial issues. These can be read in his *Letters on Imperial Relations* (Oxford, 1935.) It is, however, not uninteresting to note, as we read this magnificent survey, that Professor Keith has had uncanny skill in forecasting the course of evolution.

Anson's aim was to make clear who makes decisions, who carries them out, what are their sanctions, how they are brought into action. This aim now acquires its modern setting—a complexity shot through with history, with law, with custom, with convention. No one can read this new edition without a certain justifiable emotion, as it bridges the centuries, links past with present, and gilds the future with promise and with hope. In preserving the character of Anson's writing, in modernizing his treatise, in changing his emphasis, we are still conscious that Professor Keith has intensified an interest, as we watch monarchy become the legal guardian of liberty, and a narrow executive principle grow with the recognized source of popular rights. Above all, it is a remarkable phenomenon—to observe, to ponder on, to admire—that the crown has become the solitary legal link which unites the several sovereign states which owe it allegiance. As we lay down volumes, colored by a thousand years of history, and as we realize how a commonwealth of free states has grown up, we may well ponder the value of legal evolution and the futility of conscious legal mechanics. For here, we see failure in deliberate effort; success in Darwinian processes. While the volumes are rightly entitled "the crown," they could with equal right be called "the citizen." Professor Keith has conferred a benefit on every student of law. He has done more: to the man of insight he has unfolded a magnificent chapter in the history of human liberty. Behind and through the law of the constitution lies a great and creative human achievement.

W. P. M. KENNEDY.

University of Toronto.

Leading Articles in Current Legal Periodicals

Virginia Law Review, November (University, Va.—The Constitutionality of Government Spending for the General Welfare, by Russell L. Post; Legal Problems of Financially Embarrassed Municipalities, by Edward J. Dimock.

University of Pennsylvania Law Review, November (Philadelphia, Pa.)—The Federal Water Power Program, by George B. Clothier; Contracts Between Citizens of the United States and Foreign States, by Joseph Whitla Stinson; The Time for Taking Deductions for Losses and Bad Debts for Income Tax Purposes, by Robert C. Brown; "The Defaulting Employe"—A Correction by Samuel Williston; No Retraction, by Herbert D. Laube.

Harvard Law Review, November (Cambridge, Mass.)—Commerce, Pensions, and Codes, by Thomas Reed Powell; The Chancellor's Foot, by Max Radin; The Business of the Supreme Court at October Term, 1934, by Felix Frankfurter and Henry M. Hart, Jr.

Brooklyn Law Review, October (Brooklyn, N. Y.)—Forgery in the Law of Bills and Notes, by Jerome Prince; Trust and Penal Provisions of the New York State Mechanics' Lien Law, by Harold M. Grossman; the Recent Amendment to the Maritime Limitation of Liability Statutes, by John E. Purdy; The Public Enemy Act in New York, by John J. Sullivan.

Columbia Law Review, November (New York City)—Acquisition by a Corporation of its Own Stock, by Artur Nussbaum; Collection of Money Judgments in New York: Supplementary Proceedings, by Isadore H. Cohen; What is a "Confiscatory" Rate? by Robert L. Hale; Price Reporting as a Trade Association Activity, 1925 to 1935, by John Knight Holbrook, Jr.

American Journal of International Law, October (Washington, D. C.)—The Unilateral Denunciation of Treaties, by J. W. Garner and V. Jobst III; The Development of International Tax Law, by Mitchell B. Carroll; The Baltic States and the Soviet Union, by Gregory Rutenberg; Chinese Interstate Intercourse Before 700 B. C., by Roswell S. Britton; Two Problems of Approach to the Permanent Court of International Justice, by M. O. Hudson; Neutrality of the United States, by James Brown Scott.

Review of Recent Supreme Court Decisions

(*Continued from page* 804)

the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Refining Co. v. Ryan*, 293 U. S. 388 and *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. . . . Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern."

The case was argued by Mr. Arthur A. Goldsmith for the appellant, and by Mr. Willis S. Moore for the appellees.

The States and the Legal Profession

(*Continued from page* 785)

twenty-one years late. To my mind, a large part of the reproach and criticism which has come to this profession of ours during the past twenty years would never have been heard, if the plans of 1914 had not been put aside of necessity under the supreme National need of war time. Now, in many parts of this land, the lawyers and the Courts are becoming aroused and are ready for action. It would be a tragic thing if practical plans are not now carried through to fruition. It would disappoint and dishearten, not only members of the profession in many States, but also a large part of the public in many States. I think that you in North Carolina will agree that a vast improvement in the public point of view with respect to the legal profession comes about through its better organization, as you have organized it for yourselves in North Carolina and as I hope you will help us organize it for the better in the Nation. I thank you. (Loud Applause.)

Current Events

(*Continued from page 763*)

tion of public utility holding companies and their subsidiaries or affiliates, when engaged in interstate commerce or in transactions that directly affect or burden interstate commerce. The act aims to regulate virtually everything that such companies do, intrastate as well as interstate. All of the companies before the court are embraced within the act's provisions, although none of them does any interstate business, or is engaged in any intrastate business that directly affects or burdens interstate business.

"The theory upon which the act is predicated is that public utility holding companies and their subsidiaries are affected with 'national public interest.' But under the Constitution there is no 'national public interest' which permits of Federal regulation, unless the person, corporation or thing affected with such interest is, in fact, involved directly, not indirectly, in some activity over which the Federal Government, through one or more of the powers delegated to it by the Constitution, has jurisdiction. If the Constitution be construed to permit what the public utility act aims to accomplish, then Federal authority would embrace practically all the activities of the people, and the authority of the States over their domestic concerns would exist only by sufferance of the Federal Government.

"B. Congress, by its enactment, has exceeded its lawful authority under the postal power granted to Congress by the Constitution, in that the act arbitrarily and unreasonably denies completely the use of the mails to all persons and corporations embraced within the act with respect to all of their activities, as a penalty for non-compliance and a means of compelling compliance with the act's requirements, regardless of whether any particular use of the mails for any particular thing mailed is in fact of such character as reasonably to warrant exclusion. That is, the exclusion bears no relation necessarily to the use itself, but to the user of the mails.

"C. Congress, by its enactment, has flagrantly violated the requirements of due process of law under the fifth amendment to the Constitution in that many of the act's provisions are grossly arbitrary, unreasonable and capricious, because of the penalties which they impose for non-registration with the Securities and Exchange Commission; the restraints upon the issuance and acquisition of securities, etc.; the regulations and prohibitions with respect to service, sales and construction contracts; the taking over of virtually the entire management of the affairs of the companies embraced by the act; and the elimination or simplification of holding company systems.

"D. The invalid provisions of the act, in spite of its separability clause, are so multifarious and so intimately and repeatedly interwoven throughout the act as to render them incapable of separation from such parts of the act, if any, as otherwise might be valid. The court cannot rewrite the statute and give it an effect altogether different from that necessarily produced by its provisions viewed as a whole. Invalid parts of a law may be dropped only if what is retained is properly operative as a law. In the public utility act, invalid provisions are the rule, rather than the exception. If dissection is attempted, scarcely a clause survives, save, perhaps, the preamble."

Determinations by Supreme Court

Among the rulings of the Supreme Court made at its November 11th session were these:

Denial of certiorari in the case of Washburn-Crosby Milling Co. v. Nee, Collector, in which a quick test of the processing tax was sought. The Court did not explain this denial but the reasons, perhaps, may be found among the facts of the case, some of those which seem pertinent being: The attempt was being made to bring the case before the Supreme Court after its being merely docketed in the Circuit Court of Appeals but prior to a decision in that court. The Government made the points: (a) that in the District Court the case had not been determined on its merits but only on motion to dismiss an interlocutory injunction; (b) that the case as it stood did not raise any broad question of the constitutionality of the processing tax as of the time after amendment of the statute (The lower court had held the tax valid following the amendment but invalid theretofore); (c) that the sole question involved was whether the District Court had abused its discretion in dissolving the temporary injunction as to the taxes accrued since the amendment; (d) that the question of whether a taxpayer may enjoin collection of the processing taxes did not "appear to be raised at the present stage of the proceedings in this case so as to call for a final determination of this Court if it should grant the petition," although it was recognized that the Supreme Court in this case might construe and apply Sec. 3224 of the Revised Statutes and Sec. 21 (a) of the Agricultural Adjustment Act in determining whether there had been an abuse of discretion by the District Court; and (e) that, if certiorari were granted, this case should not be heard and considered with the Hoosac Mills case, since the two cases did not present the same or a like question and the decision of the Hoosac case might render moot the question in the Washburn-Crosby case.

The Supreme Court of the United States denied certiorari and a motion for a temporary restraining order in the Carter Coal Co. case, which sought to have determined the constitutionality of the Bituminous Coal Conservation Act of 1935. Thus was sustained the decision of the Supreme Court of the District of Columbia which had denied an injunction to restrain assessment and collection of the tax prescribed by that act but had granted an injunction against acceptance of the coal code, only upon the condition, however, that security be deposited in the amount of the tax accruing.

The Government was permitted to appear as amicus curiae in the case of Moor v. Texas & New Orleans Railroad Co., Docket No. 956, which questions the constitutionality of the Bankhead Cotton Control Act. The argument of this case will follow that in the Hoosac Mills case which is to be December 9, 1935.

On November 18th, the Supreme Court granted leave to the State of Georgia to file its bill of complaint to restrain certain officers of the Government from enforcing the Bankhead Cotton Control Act. It is expected that procedural issues in the case may be argued in February, 1936, as process is returnable January 20th. The State complainant in this case—an original proceeding in the Supreme Court under Art. III, Sec. 2, Par. 2, of the Constitution—is seeking a declaratory judgment as well as asking for injunctive relief.

The act's unconstitutionality is alleged by the State of Georgia in three respects, viz.: that it is not valid as a regulation of interstate commerce but regulates intrastate affairs; that it is an invalid attempt to exercise the Government's taxing power since the taxes are not laid for public purposes; and that it is an improper attempt to delegate legislative power. In opposing the filing of the complaint, the Government contended: that the suit was one against the United States without its consent; that it is prohibited by Revised Statutes Section 3224 which provides against maintaining suits to restrain the collection of Federal taxes; that no acts are

threatened against which injunctive relief is necessary; and that the complaint does not call for the exercise of equity jurisdiction.

Upon the Government's request, the Supreme Court, at its November 18th session, advanced the case which is to test the constitutionality of the T. V. A. and set it for argument on December 19th. It is Ashwander et al. v. Tennessee Valley Authority et al. The particular question involved is as to the right of the T. V. A. to purchase transmission lines for distribution and disposal of the surplus electric power generated at Wilson Dam. The Circuit Court of Appeals for the Fifth Circuit (78 F. (2d) 578) on July 17, 1935, sustained the validity of the transaction, thereby reversing the District Court for the Northern District of Alabama (9 F. Supp. 965) whose opinion was rendered February 22, 1935.

Operation of Housing Projects Not Contractable

The Comptroller General, whose job it is to keep all Federal expenditures strictly within the statutory bounds of their appropriations, has ruled that the housing projects may be operated by lease of the premises as a whole only where the lease is to a housing authority or similar public body. This applies to low-cost housing projects built from funds appropriated either by the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935.

The objection to conducting such projects under management contracts was that it would remove them from public control and that power thus would be delegated to the manager to employ personnel and to incur obligations in the operation of a Government-owned project. In ruling that direct management by the Government or one of its public agencies is the only method permissible, the Comptroller General said:

"The operation of low-cost housing projects being essential to the accomplishment of the purpose for which they were constructed, such of the funds appropriated under the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935, as were available for the construction of such projects, would, also, be available for the costs of their direct operation by the Government. All rentals and other receipts from the operation of such projects are required, under Sections 3617 and 3618, Revised Statutes, to be covered into the Treasury of the United States as miscellaneous receipts, without deduction."

Trade Agreement with Canada

One of the noteworthy occasions of recent years in Washington was the signing of the reciprocal trade agreement with Canada, which occurred the afternoon of Friday, November 15, 1935. Engraved copies of the agreement were signed at the White House, in the presence of the President and other officials of the two governments, by Prime Minister William Lyons MacKenzie King and Secretary of State Cordell Hull.

The position of our Government is that this agreement does not require further action by the Senate. It is to become operative January 1, 1936, that being effected here by Presidential promulgation. It is not necessary in Canada that tariff rates be ratified by the Dominion Parliament but there must be several substantial changes in the administration law of Canada. Premier King referred to the instrument he had just signed as a "trade treaty" but our Government regards it as an "agreement" and not a treaty, and therefore not subject to the constitutional requirement of Senate ratification. The difference is not cognizable to some lawyers. It is said that the making of executive agreements without Senate ratification has been practiced by the American government for many decades. Such agreements are presumed to have all the force of treaties. There has been some discussion among members of the bar as to whether there is any way that the power of the President to make these agreements can be tested in the courts.

Cincinnati Conference on Criminal Law Administration —Conclusions Reached As Result of Questionnaire— Second Conference Organized There in Support of National Bar Program

A CONFERENCE on Criminal Law Administration, organized by the Cincinnati Bar Association and sponsored by the Ohio State Bar Association, was held in Cincinnati on November 2. This conference was the second to be organized by the Cincinnati Association in support of the National Bar Program of the American Bar Association. The first was held on October 20, 1934, and considered "The Selection and Tenure of Judges in Ohio."

The conference on November 2 consisted of a morning and an afternoon session. A short program devoted to other matters was held at the intervening luncheon. The general subject of Criminal Law Administration was broken down into three main divisions. The first was that of police effectiveness, including crime detection. The second dealt with the problems of trial. The third with problems relating to the treatment of the convicted prisoner, including probation, parole and pardon. The discussions were led by physicians, psychiatrists, sociologists, judges, lawyers and administrative police officers.

There were in all eight problems. Each was set out briefly and definitely in the program and two discussion leaders assigned to it. The conference proceeded according to a schedule that allocated so much time to each problem. The Honorable John W. Peck, who presided at the morning session, and Chief Justice Carl V. Weygandt of the Ohio Supreme Court, who presided during the afternoon session, held the discussions within the assigned time limits. The result was an orderly, well balanced discussion. The discussion leaders having prepared in advance, were able to make their points concisely and effectively. The Honorable Justin Miller of the Department of Justice made a summarizing statement at the close of the conference.

Mr. A. Julius Freiberg, President of the Cincinnati Bar Association, presided at the luncheon. He presented Mr. Will Shafroth, Director of The National Bar Program, who commended the conference and took occasion to explain the movement now under way whereby state and local bar associations would have representation in a national bar assembly. Mr. Charles Racine, President of the Ohio State Bar Association, being also called on, referred to some of the interesting and important work of the State Association.

The conclusions of this conference on Criminal Law are now available. At the close of the conference, one hundred persons, in answering a questionnaire, submitted their opinions on a variety of questions that had been discussed during the day.

In the one hundred questionnaires returned the following professions were represented: medical, two; clergy, five; teachers, other than law, seven; legal, sixty-one; unclassified, twelve; and miscellaneous, thirteen. In the miscellaneous group were found one director of public welfare, one probation officer, one police lieutenant, one sales manager, one county administrator for the aged, one

hospital laboratory technician, and seven law students. In the lawyer group was a former United States District judge, three common pleas judges, six law teachers, seventeen had had some prosecuting experience or were at present prosecuting attorneys, assistant prosecuting attorneys, Assistant or United States District Attorneys, or city-solicitors. Thirty-four of the answering lawyers showed no special experience other than the general practice of law. The answerers' experience in the various professions ranged from three months to sixty-five years.

The first problems raised by the questionnaire had to do with police effectiveness. By a vote of 64 to 3 the Conference favored a longer tenure on the part of persons engaged in rural police work. Ninety-one out of ninety-four voting on the question favored a permanent organization under civil service for rural policing. Eighty-seven of the one hundred who submitted questionnaires believed that rural policing should be done by a state organization. The vote was 83 to 12 in favor of making the rural police independent of the elected county sheriffs.

The fundamental theory of criminal penalties was raised by the following questions: "Should the punishment or other treatment of convicted persons be designed primarily (a) For the sake of revenge? (b) For the sake of making examples that will deter others from crime? (c) For the sake of reforming the criminal? (d) For the elimination of dangerous persons from society? (e) For ———" Only two believed that the treatment of criminals should be designed for revenge. Forty-one believed that the treatment should be "For the sake of making examples that will deter others from crime;" forty-eight believed that it should be "For the sake of reforming the criminal;" while seventy-eight favored a treatment aimed to "eliminate dangerous persons from society."

The Conference having discussed the propriety of having some agency other than the court determine the treatment of convicted persons, the questionnaire put the question in this form: "After a court has determined the guilt of an offender, should determination of the punishment or other treatment of the guilty person be within the jurisdiction of (a) The court? (b) The parole department? (c) The welfare department? (d) A special treatment tribunal?" Twenty-seven indicated their belief that the court should determine the treatment. Three would leave it to the parole department. Two would leave it to the welfare department; while fifty-six favored setting up a special treatment tribunal for the purpose. Five thought that the determination of the punishment or treatment of the prisoner should be within the jurisdiction of the court and the parole department combined. Seven thought it should be within the jurisdiction of the court and a special tribunal. Thus it will be seen that thirty-nine favored the court's determination of the treatment of a prisoner but twelve of that thirty-nine favored a combination of the court and some other board.

Those who believe that punishment should be meted out by some group other than the court were asked to give some idea of how such a group should be constituted. Fifty-four said the personnel of such a group should include a lawyer; sixty-eight said it should include a psychologist; fifty-seven said it should include a sociologist; fifty-nine said it should include a physician; forty said it should include a social worker; thirty said it should include a business man.

In this question it was interesting to note that of the lawyers answering this question, forty-two felt that a psychologist should be on the board; thirty-four felt that a physician should be a member; thirty-three would have a sociologist on it; thirty-one a lawyer; and twenty a business man. Members of other professions voted in approximately the same ratio.

The Conference repudiated the idea of making "the punishment fit the crime" and favored making it fit the convicted person. Twelve said the treatment administered should be based primarily on the nature of the crime committed; while sixty-six said it should be based primarily on the ability, character and habits of the offender.

The question of capital punishment was stated as follows: "Would you, under any circumstances, favor putting a dangerous person to death?" Eighty-four said "Yes," and eleven said "No."

Five persons failed to answer this question or answered it equivocally. Of the eleven persons voting against capital punishment five were lawyers, one was a physician, one a minister, one a teacher in an institution of higher learning, one unclassified, one a law student and one an administrative police officer. Thus the conference answered the age old question of the advisability of employing capital punishment by an emphatic "Yes."

Those who believed that capital punishment should sometimes be resorted to were asked to be more specific as to what circumstances called for it. Five believed that imposition of the death penalty should depend solely on the crime that had been committed by the convicted person. Thirteen believed it should be imposed "Solely on the dangerousness of the person and the improbability that he can be reformed." Seventy-one believed it should be imposed "On a combination of factors; viz., the crime, the dangerousness of the person and the improbability that he can be reformed."

In answering questions relating to incarceration, the Conference again revealed its belief that the sentence of a convicted person should not depend altogether on the crime he has done. Only three of those voting favored fixing the prison sentence according to the crime committed, while seventy-four favored a sentence "until such time as the person has ceased to be socially dangerous."

The Conference by a vote of nine to one indicated dissatisfaction with the present methods of probation and parole in Ohio. Various reasons were given. Thirty-eight of those voting believe there are at present not enough officers in proportion to the number of probationers and parolees. Forty-six believe the officers are not well qualified and fifty-seven believe the parole board is sending out into the community prisoners who have not been sufficiently reconditioned to return to the community.

One part of the questionnaire involved the basis and procedure of granting paroles. Under this heading the vote was 45 to 18 against requiring a minimum term to be served in all cases. By a vote of 86 to 4 the Conference favored making psychiatric diagnosis a factor in determining whether to parole a person. The vote was 58 to 28 in favor of making public the names of indorsers for parole. There was a vote of 43 to 37 against making available employment a condition of parole.

The power of the Governor to grant pardons was challenged. Only nine voted that such power should be left with the Governor, while twenty-six believed pardons should be left to the parole board and forty-five believed the power to pardon should be vested in a special board. There was an overwhelming vote that if the present method of pardons is retained, all applications for pardon should go through the parole board, where a complete record should be made and kept open to the public.

M. L. FERSON.

Headquarters for the American Bar Association meeting at Boston will be the Hotel Statler. Further details as to hotels and other arrangements will appear in subsequent issues of the Journal.

Letter

Law of Ethiopia and the Adjacent Italian Colonies

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

Some law offices may have inquiries about the law of Ethiopia and the adjacent Italian colonies, and authentic sources of information on that law are not easily found. So I subjoin a list of books that may serve the purpose.

1. "Il Fetha Nagast, o Legislazione del Re; codice ecclesiastico e civile di Abissinia," ed. Ignazio Guidi (Rome, 1897, 2 vols.; Amharic and Italian; this is the main law-book, dating from the 1200s, and occupying somewhat the same place that Coke's Institutes once occupied in England).

2. The Constitution of Ethiopia, 1931 (in Amharic, with French translation).

3. *Carlo Conti-Rossini,* "Principii di diritto consuetudinario dell' Eritrea" (Rome, 1916; an elaborate report on the customary law of the adjacent colony of Eritrea, where similar customs obtain).

4. *Gennaro di Stephano,* "Il diritto penale nell'Hamasen (Eritrea) ed, il Fetha Nagast" (pamph. Florence 1897).

5. *Ranieri Falcone,* "I tribunali della Colonia Eritrea" (Naples, 1898; organization of the Italian courts).

6. *Leopoldo Traversi,* "La proprietà della terra in Etiopia" (pamph. Rome, 1900; the land-tenure system).

7. "Codice della Colonia Eritrea" (Naples, 1892, with the treaties, and a 200-page report on the administration of the colony, including at p. 312 an account of the sources of Ethiopian law).

8. *Guglielmo Ciamarra.* "La Giustizia nella Somalia; raccolta di giurisprudenza coloniale (Naples, 1914; an account of the Italian system in the adjacent colony of Somalia).

9. "Manuale di Legislazione della Somalia Italiana," ed. E. F. Manni (Rome, 1931); vol. I, 1913-1915; vol. VII to 1929 with index; contains the various laws and regulations applicable).

10. *Carlo Conti-Rossini,* "I Loggo e la Legge dei Loggo Sarda" (Florence, 1904, pamph.; a study of the history of Ethiopian law).

11. *J. B. Coulbeaux,* "Historie politique et religieuse d'Abyssinie" (Paris, Geuthner, 1928, 2 vols., an authoritative account of the political and administrative history, by a missionary who spent his life there).

12. "Corpus Juris Abessinorum; Pars I, Jus Connubii." Ed. Dr. Johannes Bachmann (Berlin, 1889; the marriage law; Amharic text, followed by a Latin translation and a brief historical sketch of the sources).

Information on additional sources will be welcomed.

JOHN H. WIGMORE.
Gary Library of Northwestern University, Nov. 20, 1935.

N. D. Bar Association Contest

"For the winning article on some subject to be selected later, the N. D. Bar Association will offer a prize of an amount not yet definitely determined but which will probably be in the neighborhood of $100. The full particulars and conditions of the contest will be announced later. At a meeting of the Executive Committee in President Hildreth's office at Fargo on September 28th it was decided that such an offer will be made. It will be limited to North Dakota practicing attorneys who have been in practice not to exceed five years. One of the conditions of the contest will be that the winner shall appear at the next annual meeting and read his article to the Association. A method has been devised whereby the judges in the contest, at the time of determining the winner, will not know the identity of the author of any of the papers submitted."—From *N. D. Bar Briefs.*

News of the Bar Associations

North Carolina State Bar Holds Second Annual Meeting —Addresses by President Broughton, President Ransom of the American Bar Association, and Others— Superior Court Judges' Conference

THE second annual meeting of The North Carolina State Bar, generally referred to as the incorporated bar, was held in Raleigh on October 18, 1935, and was largely attended.

An address of welcome was made by Willis G. Briggs, President of the Wake County Bar Association, which was responded to by Julius C. Smith, Vice-President of The North Carolina State Bar.

Committee reports showed much activity by the Council and Committees during the past year. The Grievance Committee reported that since the organization of The State Bar, two years ago, affirmative disciplinary action had been taken in twenty-four cases.

An able address was delivered by Hon. William L. Ransom, President of the American Bar Association, whose subject was "The States and the Legal Profession." This was followed by an address by Judge Henry A. Grady on "The Opportunities of the North Carolina State Bar as seen from the Superior Court Bench."

The morning session was closed with an address by Hon. A. D. MacLean, Assistant United States Attorney General, on "A Lawyer's Duty Toward the Constitution".

JULIUS C. SMITH
President, North Carolina State Bar

The afternoon session was featured by the following addresses:

"Relation Between The N. C. State Bar and the N. C. Bar Association," by J. M. Broughton, of Raleigh, President of the N. C. Bar Association.

"The Problems of the Board of Law Examiners," by Judge L. R. Varser, of Lumberton, Chairman of the Board of Law Examiners.

"The Work of the Commission on Revision of the Laws of North Carolina Relating to Estates," by Prof. Fred B. McCall, University Law School, Chapel Hill.

A feature of this year's program was a luncheon conference held by nineteen Superior Court Judges. It proved so successful that it was decided to make this an annual affair.

By a standing vote a resolution of thanks was extended retiring President I. M. Bailey for his faithful and efficient services rendered during the first two years of the existence of The State Bar.

The following new officers were elected for the coming year: Julius C. Smith, Greensboro, President; Charles G. Rose, Fayetteville, Vice-President; Henry M. London, Raleigh, Secretary-Treasurer.

HENRY M. LONDON,
Secretary.

Virginia State Bar Association Provides for Special Committee to Consider Means for Selecting Member of General Council and Members of State Council by the Association—A Successful Meeting Held

THE Forty-Sixth Annual Meeting of the Virginia State Bar Association was held at The Greenbrier Hotel, White Sulphur Springs, West Virginia, on August 8, 9, and 10, 1935, with an attendance in excess of two hundred members. This was perhaps above the average attendance and twice as many as went on the cruise to Bermuda in 1934. The meeting was pronounced by those present one of the most successful the Association has had in recent years.

On the evening of the first day, August 8th, the President held a reception which furnished an opportunity for those attending to meet the president and to become acquainted among themselves. On Friday, August 9th, at 10 A. M., the business meeting of the convention commenced. There was an address of welcome by Hon. Frank C. Haymond, followed by an address by the President, Hon. C. O'Conor Goolrick, of Fredericksburg, whose subject was "The Present Trend in Government." On the same day, in addition to reports of Committees, there was a paper by Mr. Barron F. Black, of Norfolk, entitled "The Sales Tax: Its Operation and Effect in Virginia."

On the afternoon of August 9th there was a joint meeting of the Association with the Judicial Section at which a paper was read by Mr. Herbert G. Cochran, Judge of the Juvenile and Domestic Court of Norfolk, entitled "Should Virginia have a State Wide System of Probation and Parole?" Later on the same afternoon there was a meeting of the Section on Legal Education, W. H. Moreland, Dean of the Law School of Washington and Lee University, chairman, presiding. The Section was fortunate in having present Mr. Will Shafroth, Chairman of the Section on Legal Education of the American Bar Association. In the evening, the annual address was delivered by Hon. Tom Connally whose subject was "The Congress and the Constitution." Senator Connally was introduced by Hon. H. G. Kump, Governor of West Virginia.

Business on the second day consisted principally of consideration of the report on Resolutions. The reports which were more or less notable were those on Legal Education and Admission to the Bar, Frank W. Rogers, of Roanoke, Chairman; Legislation and Law Reform, James G. Martin, of Norfolk, Chairman; Committee on Judiciary and Judicial Salaries, John L. Abbot, of Lynchburg, Vice-Chairman, acting for the Chairman, J. Gordon Bohannan, of Petersburg; Special Committee on Or-

STUART CAMPBELL
President, Virginia Bar Association

ganization of the Bar, James W. Gordon, of Richmond, Chairman; and the Committee on Unauthorized Practice of the Law, Ralph T. Catterall, of Richmond, Chairman.

The recent meeting of the Virginia Association was unique in that all committees, both standing and special, reported one hundred percent.

The meetings of the Virginia State Bar Association in recent years have been notable from a social standpoint and the recent meeting was not an exception in this respect. The excellent facilities of The Greenbrier for dancing and other entertainment were enjoyed to the fullest extent.

At the annual dinner the Association was fortunate in having as its principal speaker, Mr. J. Fred Essary, whose subject was "Lifting the Lid in Washington." Mr. Scott M. Loftin, lately President of the American Bar Association, was present and delivered a very able and inspiring address.

Amongst other actions taken at the meeting, most of which are more or less of local interest, was the adoption of the following resolution pertaining to the American Bar Association:

"Resolved that the President of this Association appoint a special committee to consider ways and means whereby the selection of the member of the General Council of the American Bar Association and the members of the State Council from this State of that Association may be made by this Association, and

Resolved further that this committee submit to the next meeting of this Association a plan whereby the foregoing may be accomplished."

Officers elected at the meeting for the current year were: President, Stuart B. Campbell, Wytheville, who had previously served for several years on the Executive Committee and for the past year as Chairman; Vice-Presidents—Charles Pickett, Fairfax, John Martin, Halifax, Howard C. Gilmer, Jr., Pulaski, J. Vaughan Gary, Richmond, and F. S. Tavenner, Jr., Woodstock.

The Executive Committee consists, in addition to ex officio members, of the following: George E. Haw, Richmond, Chairman; Channing M. Hall, Williamsburg; Landon Lowry, Bedford; R. O. Norris, Jr., Lively; E. W. Poindexter, Roanoke; Robert Whitehead, Lovingston.

Wisconsin State Bar Association Considers National Bar Program—President Doyle Appeals to Bench and Bar to Help Educate Public in Constitutional Principles —Committee Reports, Etc.

THE 1935 convention of the State Bar Association of Wisconsin was held the last week in June at the Lawsonia Country Club hotel at Green Lake, Wisconsin, this being the third consecutive year that the Association has met at this delightful summer resort. The convention was well attended.

President T. L. Doyle, in his opening address, appealed to the bench and bar to help educate the people in constitutional history and principles and to aid in defending the constitution and our government against attacks by radicals and others who are not sympathetic with and know very little about such principles.

The president's address was followed by a Legal Clinic which dealt with the social security act and like subjects. Dr. Edwin E. Witte, executive director of the President's Committee on Economic Security and professor of economics at the University of Wisconsin, explained the social security act, its background and purposes. Mr. Paul Raushenbush, of the Unemployment Commission of Wisconsin, described the Wisconsin unemployment insurance plan. He was followed by Harold W. Story, vice-president and general attorney of the Allis-Chalmers Manufacturing Company of Milwaukee, who spoke on the subject of unemployment insurance from the standpoint of the employer. Thomas Whelan, professor of law at Marquette University in Milwaukee, discussed the unemployment insurance plan as it applies to religious and eleemosynary corporations.

The principal out-of-state speaker was Hon. James M. Landis, member of the Federal Securities and Exchange Commission, who described in an informal and interesting manner the experience of the commission in administering the Securities Act of 1933 and the Stock Exchange Act of 1934.

The Friday morning session was devoted to consideration of the National Bar Program and included an address by Judge Robert S. Cowie, of La Crosse, on "A New Deal in Criminal Law." This address resulted in much subsequent newspaper comment because of Judge Cowie's criticism of the handling of the Dillinger case by federal officers.

The report of the Committee on Unauthorized Practice, given by the chairman, Edmund B. Shea, of Milwaukee, reviewed recent decisions affecting the unauthorized practice of the law, as it relates to collection agencies, claim adjusters, trust companies, and others, and to the practice by non-lawyers before the various state commissions. He reported that quo warranto actions had been begun by the Attorney General of Wisconsin at the instance of the State Bar Association, and that the results had been satisfactory in putting an end to unlawful practice in specific cases. The chief purpose of the suits, however, was to demonstrate that quo warranto is a simple and appropriate remedy for preventing practice of law by lay individuals, although the remedy by injunction is also effective and appropriate

OTTO A. OESTREICH
President, Bar Association of Wisconsin

for the purpose sought to be accomplished.

The committee stated its belief "that the practice of law should be held to include all advice and all other legal services rendered by a lawyer to a client in the course of transactions customarily handled by lawyers," and that this is the view of the courts generally.

Mr. Shea introduced a resolution condemning a bill introduced in the Wisconsin legislature which would permit notaries public to draft wills, deeds, mortgages, and similar instruments and charge therefor. The resolution was unanimously adopted, and the bill was finally killed in the house in which it originated.

The Committee on Qualifications for the Bar and Admissions to Practice presented a majority report recommending support of legislation which would repeal the so-called "Diploma Privilege," which permits admission to practice of the graduates of the law schools of the University of Wisconsin and Marquette university, upon presentation of their diploma. A minority report presented by Lloyd K. Garrison, dean of the University of Wisconsin law school, and one other member of the committee took the opposite view and recommended the continuation of the present system. Upon motion, the views of the minority were upheld by the convention.

The new Committee on Court of Administrative Appeals, reporting through Ralph M. Hoyt, Milwaukee, chairman, recommended the proposal of a constitutional amendment which would authorize the creation of a state-wide ad-

ROBERT F. MAGUIRE
President, Oregon State Bar

ministrative court with appointive judges, to be selected in such manner as to eliminate politics. The committee felt there is need for such a court. The committee was continued and authorized to introduce the necessary legislation and draft such amendments thereto as they might deem necessary.

Interesting reports from other committees were received and filed as follows: American Law Institute, Integrated Bar Program, State Commissions, Automobile Accidents, Judicial, Grievance, Rules of Federal Procedure and Practice, Amendment of Law, Study of the Statutes, Rules of Pleading, Practice and Procedure, Property Laws, and Necrology.

J. WARD CARVER
President, Vermont Bar Association

Friday afternoon was given over to recreation, which included a golf tournament for men. A ladies' golf tournament was held in the forenoon and contract and auction bridge tournaments were held for the ladies both Thursday and Friday afternoons. A musicale and tea was also given for ladies and guests Friday afternoon, at which a program of selected numbers for violin and piano was given by John S. Glasier of Madison and Dorothy Wilson, his accompanist.

A banquet was held in the hotel dining room Friday evening, attended by approximately 300 members and guests. Justice E. T. Fairchild, of the Wisconsin Supreme Court, acted as toastmaster at the after-dinner program, which was more than usually interesting and entertaining. It consisted of an address by Michael Cleary of Milwaukee, president of the Northwestern Mutual Life Insurance Company, upon the economic relation of insurance to the stability of our family life. Daniel Grady, of Portage and Madison, talked upon the subject of the Bar and its critics. Following that, Herbert Steffes, chairman of the Junior Bar of Milwaukee, explained the Junior Bar movement in Wisconsin and throughout the United States. Golf and bridge prizes were then awarded.

At the final session of the convention on Saturday the following officers were elected: Otto A. Oestreich, Janesville, president; Ray B. Graves, Wisconsin Rapids, vice-president; Gilson G. Glasier, Madison, secretary and treasurer.

GILSON G. GLASIER,
Secretary and Treasurer.

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Frank T. Boesel .....Milwaukee, Wis.
James H. Corbitt.....Suffolk, Va.

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North Dakota—Grand Forks.....Harrison A. Bronson
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Oklahoma—Ponca City.....Joseph S. Lewis
Oregon—Portland .....Sidney Teiser
Pennsylvania—Philadelphia .....Joseph W. Henderson
Philippine Islands—Manila.....L. D. Lockwood
Puerto Rico
Rhode Island—Providence.....James C. Collins
South Carolina—Charleston .....George L. Buist
South Dakota—Huron .....Lewis Benson
Tennessee—Memphis .....Earl King
Texas—Houston .....D. A. Simmons
Utah—Salt Lake City.....George H. Smith
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Virginia—Richmond .....Thomas B. Gay
Washington—Seattle .....O. B. Thorgrimson
West Virginia—Huntington.....Douglas W. Brown
Wisconsin—Milwaukee.....Carl B. Rix
Wyoming—Cheyenne .....William O. Wilson

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